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Supreme Court of the United States

TERRENCE JOHNSON, JIM HARRIS, JOSHUA ROBERTS,

Petitioners,

—v.—

BILL HASLAM, Governor of the State of Tennessee; MARK GOINS, Coordinator of Elections; TRE HARGETT, Secretary of State of Tennessee; RICHARD HOLDEN, Administrator of Elections for Shelby County; KIM BUCKLEY, Administrator of Elections for Madison County; ALBERT U. TIECHE, Administrator of Elections for Davidson County, in their official capacities,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a state may condition the restoration of voting rights to people with felony convictions: (a) on the payment of restitution and child support regardless of the person's financial ability to satisfy those debts; and (b) on the payment of child support when such payment is unrelated to the person's underlying conviction and sentence?

2. Whether the Twenty-Fourth Amendment, which prohibits states from denying the right to vote based on failure to pay a "poll tax or other tax," applies to state laws that set the payment of restitution and child support as a voter qualification when the state monetarily benefits from the collection of such payments?

3. Whether the Sixth Circuit exceeded its judicial authority in ruling that the Tennessee Constitution's Ex Post Facto Clause is not violated by the retroactive application of Tennessee laws that expand a convicted person's disenfranchisement period, notwithstanding the Tennessee Supreme Court's ruling in *May v. Carlton*, 245 S.W.3d 340 (Tenn. 2008), holding that the state's felon disenfranchisement law is penal in nature and cannot be retroactively applied?

PARTIES TO THE PROCEEDING

All of the respondents have been named in their official capacities. Pursuant to Rule 25(d), Fed. R. Civ. P., the following parties have been automatically substituted for their predecessors in office: Bill Haslam has been substituted for Phil Bredesen as Governor of Tennessee; Mark Goins has been substituted for Brook Thompson as Coordinator of Elections; Tre Hargett has been substituted for Riley Darnell as Secretary of State of Tennessee; and Albert U. Tieche has been substituted for Ray Barrett as Administrator of Elections for Davidson County.

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OPINIONS BELOW

The opinion of the court of appeals is reported at 624 F.3d 742 (6th Cir. 2010). Pet. App. 1a-88a. The order denying rehearing and rehearing en banc is also reported at 624 F.3d 742. Pet. App. 89a-90a. The opinion of the Middle District of Tennessee is reported at 579 F. Supp.2d 1044 (M.D. Tenn. 2008). Pet. App. 91a-126a.

JURISDICTION

The court of appeals entered its judgment on October 28, 2010. The court denied a petition for rehearing and rehearing en banc on December 17, 2010. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment provides in relevant part:

No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.

Section 2 of the Fourteenth Amendment provides in relevant part:

[W]hen the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation

therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

The Twenty-Fourth Amendment states in relevant part:

The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.

Article 1, Section 11 of the Tennessee Constitution provides in relevant part:

[L]aws made for the punishment of acts committed previous to the existence of such laws, and by them only declared criminal, are contrary to the principles of a free Government; wherefore no Ex post facto law shall be made.

Tenn. Code Ann. § 40-29-202 provides:

(a) A person rendered infamous and deprived of the right of suffrage by the judgment of any state or federal court is eligible to apply for a voter registration card and have the right of suffrage restored upon: (1) Receiving a pardon, except where such pardon contains special conditions pertaining to the right of suffrage; (2) The discharge from custody by reason of service or expiration of the maximum sentence imposed by the court for any such infamous crime; or (3) Being granted a certificate of final discharge from supervision by the board of probation and parole pursuant to § 40-28-105, or any

equivalent discharge by another state, the federal government, or county correction authority.

(b) Notwithstanding the provisions of subsection (a), a person shall not be eligible to apply for a voter registration card and have the right of suffrage restored, unless the person:

(1) Has paid all restitution to the victim or victims of the offense ordered by the court as part of the sentence; and

(2) Beginning September 1, 2010, notwithstanding the provisions of subsection (a), a person shall not be eligible to apply for a voter registration card and have the right of suffrage restored, unless the person has paid all court costs assessed against the person at the conclusion of the person's trial, except where the court has made a finding at an evidentiary hearing that the applicant is indigent at the time of application.

(c) Notwithstanding the provisions of subsection (a), a person shall not be eligible to apply for a voter registration card and have the right of suffrage restored, unless the person is current in all child support obligations.

STATEMENT OF THE CASE

a. *Statutory Framework*

Tennessee law denies voting rights to people convicted of an infamous crime.[1] Tenn. Const. art.

[1] All felonies in Tennessee are considered infamous crimes. Tenn. Code Ann. § 40-20-112.

IV, § 2; Tenn. Code Ann. §§ 40-20-112, 40-29-201-205. Tennessee also provides for restoration of the right to vote provided the following conditions are met: (a) the person is not serving a term of imprisonment, parole, or probation; (b) all restitution associated with the criminal sentence has been paid; (c) all court costs have been paid unless the person is found to be indigent; and (d) the person is current on any court-ordered child support payments. Tenn. Code Ann. § 40-29-202. The requirements that restitution and child support be paid in full were first enacted in 2006 and apply retroactively. The child support obligation must be satisfied even if the child support payment is unrelated to the underlying conviction for which the person was disenfranchised. Moreover, there is no indigency exception in the statute for child support or restitution; the indigency exception applies only to court costs.

If the above-mentioned conditions are met, a person may initiate the process of getting his or her voting rights restored by submitting a Certificate of Restoration form to the county election commission office in his or her county of residence. Once a person submits a Certificate of Restoration form and all of the information on the form is verified, the person's voting rights are automatically restored. *See* State Defendants' Response to Plaintiffs' First Set of Interrogatories and Requests for Production of Documents, C.A. App. 25.[2]

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[2] "C.A. App." refers to the appendix that was filed in the court of appeals.

b. *Factual Background*

Petitioner Terrence Johnson is a citizen of the United States and a resident of Shelby County, Tennessee. He was convicted of federal wire fraud in 1999 and was ordered to pay over $40,000 in restitution plus any accrued interest. He has completed his term of imprisonment. The term of supervised release that followed his imprisonment ended when the federal judge presiding over Johnson's criminal case found that Johnson was "unable to satisfy the restitution as ordered by [t]he Court," and that "[b]ased upon his finances and necessary living expenses, it appears that he has paid to the best of his ability." C.A. App. 10. The restitution order, however, otherwise remains in effect and bars Johnson from regaining his right to vote. As the court made clear at the time it ended Johnson's supervised release, "the victim's right to recovery remains in effect and enforceable and can be achieved, if necessary, through civil litigation." *Ibid.* Johnson also has overdue child support payments.

Petitioner Jim Harris is a citizen of the United States and a resident of Madison County, Tennessee. He was convicted of drug offenses in 1995, attempted burglary and a felony drug offense in 1996, and a felony drug offense in 2001. At the time this litigation began, he had completed his terms of imprisonment, parole, and probation for all of those offenses, but still owed about $2,500 in overdue child support payments.[3]

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[3] Petitioner Harris since has satisfied all of his outstanding child support payments, but still has standing to remain in this suit because the amended complaint sought nominal monetary damages for the past denial of his right to register and vote

Petitioner Joshua Roberts is a citizen of the United States and a resident of Davidson County, Tennessee. He was convicted of forgery, evading arrest and tampering with evidence in the State of Missouri between 1999 and 2001. After completing his term of imprisonment, parole, and probation for these offenses, Roberts applied for restoration of his voting rights in April 2008. The State denied his application on the ground that he owed over $7,000 in outstanding child support.[1]

All of the petitioners would have been eligible for automatic restoration of their voting rights but for Tennessee's requirement that they satisfy their restitution and/or child support obligations, regardless of their ability to pay. They also would have been eligible to vote but for the state's retroactive application of the restitution and child support requirements.

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based on his outstanding child support payments. *See Lynch v. Leis*, 382 F.3d 642, 646 n.2 (6th Cir. 2004) ("We note briefly that [the plaintiff] had asserted below a claim for nominal damages, which is normally sufficient to establish standing, defeat mootness, and grant prevailing party status for the purpose of attorney fees under 42 U.S.C. § 1988.").

[1] This lawsuit also named Alexander Friedmann as a plaintiff. Friedmann was convicted of two felonies in 1989 and completed his term of imprisonment, parole, and probation for those offenses. He applied for restoration of his voting rights in 2006, but the State denied his application on the ground that he owed over $1,000 in restitution. In addition to challenging the constitutionality of that statutory requirement, Friedmann asserted a due process claim related to his difficulties in confirming the amount he owed in restitution and in getting an authorized governmental official to sign his Certificate of Restoration form. The parties settled Mr. Friedmann's due process claim and he was voluntarily dismissed from the case.

c. Proceedings Below

On February 25, 2008, the petitioners filed a lawsuit seeking to invalidate Tenn. Code Ann. §§ 40-29-202(b) and (c), which condition the restoration of voting rights for people convicted of infamous crimes on the payment of restitution and child support, respectively. They challenged these requirements as unconstitutional voter qualifications in violation of the Fourteenth Amendment's Equal Protection Clause, the Twenty-Fourth Amendment, and the Privileges and Immunities Clauses of the federal and state constitutions. Based on the Tennessee Supreme Court's ruling that the state's disenfranchisement laws are penal in nature, *May v. Carlton*, 245 S.W.3d 340 (Tenn. 2008), the petitioners further asserted that Tennessee's restitution and child support requirements were unconstitutional as applied because they violated Tennessee's state constitutional guarantee against ex post facto laws. Petitioners requested declaratory and injunctive relief, as well as nominal damages.

On August 1, 2008, the state defendants filed a Fed. R. Civ. P. 12(c) motion for judgment on the pleadings as to all of the petitioners' claims. The petitioners filed a cross-motion under Fed. R. Civ. P. 12(c) or, in the alternative, a motion for partial summary judgment pursuant to Fed. R. Civ. P. 56(a). The district court held a hearing on the parties' respective motions on September 3, 2008, and, on September 22, 2008, granted the defendants' Rule 12(c) motion.

A divided panel of the court of appeals affirmed. First, the court applied a rational basis test to the petitioners' equal protection claim and

held that "Tennessee possesses valid interests in promoting payment of child support, requiring criminals to fulfill their sentences, and encouraging compliance with court orders." Pet. App. 9a-10a. The court rejected the petitioners' argument that the restitution and child support requirements denied voting rights even to those unable to pay, reasoning that "[t]he legislature may have been concerned, for instance, that a specific exemption for indigent felons would provide an incentive to conceal assets and would result in the state being unable to compel payments from some non-indigent felons." Pet. App. 11a.

The court of appeals also rejected the petitioners' Twenty-Fourth Amendment claim on the ground that the restitution and child support payments at issue are not a "poll tax or other tax" prohibited by the Twenty-Fourth Amendment. Pet. App. 19a. Finally, the court rejected petitioners' ex post facto claim based on its determination that the challenged laws serve "legitimate non-punitive interests," were not enacted with a punitive purpose, and are not excessive. Pet.App. 23a. In reaching this conclusion, the majority held that the Tennessee Supreme Court's ruling in *May v. Carlton* was not binding because its ruling that the state's disenfranchisement law is penal in nature was "pure dicta." Pet. App. 25a.[5]

[5] In addition, the majority rejected the petitioners' claims under the Privileges and Immunities Clauses of the U.S. Constitution and Tennessee Constitution, reasoning that those provisions do not apply to voting rights. Pet. App. 20a. Petitioners do not seek review of that ruling in this Court.

Judge Moore dissented from each of the majority's holdings. Although agreeing that the rational basis test applied to the petitioners' equal protection claim, she concluded that "the absence of any policy justification for the distinction in the instant case, as well as [U.S.] Supreme Court precedent addressing the propriety of provisions that discriminate on the basis of wealth, compel the conclusion that . . . Tennessee has no rational basis for denying voting rights to only those felons with outstanding financial obligations, despite their inability to pay." Pet. App. 29a-30a. In contrast to the majority, she determined that at least some portions of the restitution and child support payments met the definition of a "poll tax or other tax" under the Twenty-Fourth Amendment because the state uses part of those funds as state levies to support government programs. Pet. App. 63a-64a. Judge Moore also characterized the majority's interpretation of the Tennessee Supreme Court's ruling in *May v. Carlton* as "unduly restrictive," explaining that "[a]s compared to the pre-2006 version of the law, the challenged provisions make it more difficult to have the right of suffrage restored." Pet. App. 82a. "In concluding otherwise," she wrote, "the majority fails to acknowledge that § 40-29-202(b) and (c) prolong the period of clearly penal disenfranchisement." Pet. App. 82a-83a.

REASONS FOR GRANTING THE PETITION

Forty-five years ago, this Court held in *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 666 (1966), that the Equal Protection Clause prohibits a state from conditioning the right to vote on the wealth of the voter or the payment of a fee. The

Twenty-Fourth Amendment embodies a similar principle in its prohibition of poll taxes. Underlying both the Twenty-Fourth Amendment and this Court's decision in *Harper* is the understanding, fundamental to our American democracy, that "[w]ealth, like race, creed, or color is not germane to one's ability to participate intelligently in the electoral process." 383 U.S. at 668.

Tennessee's re-enfranchisement scheme is irreconcilable with this constitutional vision. Having chosen to provide a means for convicted felons to regain the right to vote, Tennessee has conditioned that right on the repayment of any outstanding restitution, court costs, and child support payments. This statutory impediment to the restoration of voting rights violates equal protection for three separate reasons. First, as this Court recognized in *Harper*, the imposition of any fee on the right to vote "dilute[s]" the right for those with limited means. 383 U.S. at 668. Second, that discrimination is heightened when, as here, the state fails to provide an exception for those who are unable to pay. Third, Tennessee has compounded the constitutional problem by demanding the repayment of delinquent child support payments that are unrelated to the underlying conviction and, thus, unrelated to the initial justification for stripping individuals, like petitioners, of the right to vote in the first place.

Tennessee's re-enfranchisement scheme also violates the Twenty-Fourth Amendment because a portion of the outstanding debts that must be satisfied before the right to vote can be restored goes to the state. To that extent, Tennessee's law is properly understood as a more "sophisticated" way of

collecting a "poll tax or other tax" forbidden by the Twenty-Fourth Amendment. *See Harman v. Forssenius*, 380 U.S. 528, 540 (1965).

Furthermore, the court of appeals improperly disregarded the Tennessee Supreme Court's own interpretation of state law when it ruled that retroactive application of the challenged provisions does not violate the state constitution's prohibition on ex post facto laws. While the court of appeals clearly disagreed with the Tennessee Supreme Court's conclusion that the state's disenfranchisement law is penal in nature, the state's interpretation of its own ex post facto clause is authoritative and should have been followed by the court below.

Finally, these legal errors raise issues of national importance. More than 94,000 people in Tennessee are disenfranchised. Although Tennessee is currently the only state to condition re-enfranchisement on child support, over thirty states require convicted felons to pay restitution or court costs before regaining the right to vote. Given the prevalence of such laws, this Court can and should clearly hold that the right to vote cannot be premised on the ability to pay, even for people with criminal convictions.

I. THE COURT OF APPEALS' DECISION CONFLICTS WITH DECISIONS OF THIS COURT STRIKING DOWN LAWS THAT DENY THE RIGHT TO VOTE BASED ON A PERSON'S ECONOMIC STATUS.

The court of appeals ruled that a state may refuse to restore voting rights to a convicted person

based solely on their failure to pay restitution or child support even when the requirement discriminates against people based on their wealth. Pet. App. 8a-11a. The court's holding conflicts with this Court's decision in *Harper*. If permitted to stand, the court's ruling would allow states to deny voting rights to people who otherwise are qualified to vote but who lack the financial resources to satisfy their restitution and child support obligations. The opinion below merits this Court's consideration because Tennessee's requirement that a person pay their financial debts as a condition to vote does not pass constitutional muster under any level of scrutiny.[6]

A. The Equal Protection Clause Bars States From Denying The Right To Vote Based On Indigency.

In *Harper* this Court held that "[w]ealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process." Tennessee's re-enfranchisement scheme is antithetical to that holding. The impact of Tennessee's scheme is obviously most severe on those who are unable to pay the debts that Tennessee has made a condition of voting. However, this Court's equal protection jurisprudence has not been limited to those who lose the right to vote because they

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[6] The petitioners consistently have argued below that their equal protection claim is entitled to a heightened level of scrutiny in accordance with the balancing test laid out in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992), but that even the lowest level of review requires the defendants to show that the law is nondiscriminatory and reasonable.

cannot pay a state-imposed fee. As this Court explained in *Harper*:

> We say the same whether the citizen, otherwise qualified to vote, has $1.50 in his pocket or nothing at all, pays the fee or fails to pay it. The principle that denies the State the right to dilute a citizen's vote on account of his economic status or other such factors by analogy bars a system which excludes those unable to pay a fee to vote or who fail to pay.

Id. at 668.

Respondents have argued throughout this litigation that the holding in *Harper* is irrelevant here because petitioners lost their constitutionally-protected right to vote when they were convicted of a felony. This case, however, is not about the constitutionality of Tennessee's disenfranchisement law; rather, it is about the constitutionality of Tennessee's re-enfranchisement law. Once a state adopts a process for determining who is qualified to vote, as Tennessee has done, "to introduce wealth or payment of a fee as a measure of a voter's qualifications is to introduce a capricious or irrelevant factor." *Harper*, 383 U.S. at 668. Like other voter disqualifications that this Court has struck down, Tennessee's law uses irrelevant criteria to impermissibly deny one group of voters the right to participate in elections "on an equal basis with other qualified voters." *Lubin v. Parish*, 415 U.S. 709, 713 (1974) (citing *San Antonio Sch. Dist. v. Rodriguez*, 411 U.S. 1, 59 n.2 (1973) (Stewart, J., concurring)). *See also Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) ("[A] citizen has a constitutionally

protected right to participate in elections on an equal basis with other citizens in the jurisdiction.").

The court of appeals held that Tennessee has a legitimate interest in conditioning the right to vote on payment of restitution and child support. Pet. App. 10a. However, even under rational basis, this Court has rejected purported state interests that condition the right to vote on a person's economic status. *See Quinn v. Millsap*, 491 U.S. 95 (1989) (law requiring members of a government board to own real property was not rationally related to any legitimate state interest and violated equal protection); *Turner v. Fouche*, 396 U.S. 346, 362-364 (1970) (law requiring members of local school board to own real property bore no rational relationship to any legitimate government interest); *City of Phoenix v. Kolodziejksi*, 399 U.S. 204 (1970) (Arizona law which excluded non-property owners from voting in elections involving the disbursement of general obligation bonds violated the Equal Protection Clause).[7]

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[7] *See also Cipriano v. City of Houma*, 395 U.S. 701 (1969) (denial of voting rights to non-property owners in elections on revenue bonds violates equal protection clause); *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621 (1969) (a State cannot restrict the vote in school district elections to owners and lessees of real property). Circuit courts have applied the rulings in these cases when striking down laws that impose unnecessary and burdensome financial requirements in the voting rights context. *See Lindstedt v. Mo. Libertarian Party*, 160 F.3d 1197, 1198 (8th Cir. 1998) (upholding Missouri ballot access law that allowed indigent candidates to seek a waiver of filing fees); *Fulani v. Krivanek*, 973 F.2d 1539 (11th Cir. 1992) (striking down Florida election law that denied minor party candidates option to seek a waiver of signature verification fee, finding that law violated First and Fourteenth Amendments by

In *Harper*, the state charged a fee for voting. In this case, the state requires convicted felons to discharge certain debts before regaining their vote. The latter, like the former, puts a price on the right to vote. Both are unconstitutional under this Court's equal protection jurisprudence.

B. Tennessee's Re-enfranchisement Law Violates The Equal Protection Clause By Failing To Include An Indigency Exception.

Even if it might be permissible for the state to condition the right to vote on the repayment of debts in certain circumstances, it is unconstitutional for the state to enforce that exclusion against individuals unable to pay.

That principle, moreover, does not depend on whether regaining one's vote after a felony conviction is described as a right or a privilege. For example, in *Griffin v. Illinois*, 351 U.S. 12 (1956), the Court recognized that states were not constitutionally compelled to provide criminal defendants with appellate review. Yet, the Court explained, that premise does not lead to the conclusion that "a State that does grant appellate review can do so in a way that discriminates against some convicted defendants on account of their poverty." *Id.* at 18. The Court further added, "[p]lainly the ability to pay [court] costs in advance bears no rational relationship to a defendant's guilt or innocence and

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conditioning ballot access on payment of a fee in spite of the undue financial burden imposed on candidates).

could not be used as an excuse to deprive a defendant of a fair trial." *Id.* at 17-18. In the words of Judge Moore below, "[t]he analogy to the instant case is striking." Pet.App. 39a.

Similarly, in *Roberts v. LaVallee*, 389 U.S. 40, 42 (1967), this Court recognized that "[o]ur decisions for more than a decade now have made clear that differences in access to the instruments needed to vindicate legal rights, when based upon the financial situation of the defendant, are repugnant to the Constitution." *See also Williams v. Illinois*, 399 U.S. 235, 241 (1970) (invalidating a law which allowed the state to imprison a convicted person who failed to satisfy the financial obligations associated with his sentence, reaffirming its "allegiance to the basic command that justice be applied equally to all persons"); *Douglas v. California*, 372 U.S. 353 (1963) (denial of appellate counsel to indigent defendants violated the Equal Protection Clause).

This Court again reaffirmed these principles in *Bearden v. Georgia*, 461 U.S. 660 (1983). In *Bearden*, the Court ruled that a state may not revoke an indigent defendant's probation for failure to pay a fine and restitution without first determining whether the defendant made any bona fide attempts to pay the debt or whether an alternative form of punishment existed. "To do otherwise would deprive the probationer of his conditional freedom simply because, through no fault of his own, he cannot pay the fine." *Id.* at 672-673. *See also M.L.B. v. S.L.J.*, 519 U.S. 102 (1996) (state could not dismiss appeal of parent challenging revocation of parental rights solely because parent lacked financial means to pay record preparation fees).

In light of *Bearden*, appellate courts routinely have required lower courts, at a bare minimum, to develop the record sufficiently to establish whether or not a person affected by a monetary obligation lacks the means to satisfy that obligation. *See Legair v. Circuit City Stores, Inc.*, 213 Fed. Appx. 436, 440 (6th Cir. 2007) ("A district court that fails to inquire into the sanctioned party's ability to pay abuses its discretion."); *Dell Inc. v. Compudirect, Inc.*, 316 Fed. Appx. 32, 34 (2d Cir. 2009) ("[A] party's complete inability, due to poverty or insolvency, to comply with an order to pay court-imposed monetary sanctions is a defense to a charge of civil contempt.") (citing *Huber v. Marine Midland Bank*, 51 F.3d 5, 10 (2d Cir. 1995)); *Wadkins v. Estep*, 194 Fed. Appx. 502, 504 (10th Cir. 2006) ("A prisoner seeking leave from this Court to proceed [in forma pauperis] must show 'a financial inability to pay the required fees . . . .'") (citing *McIntosh v. U.S. Parole Comm'n*, 115 F.3d 809, 812 (10th Cir. 1997)); *In re Mendoza*, 182 Fed. Appx. 661, 664 (9th Cir. 2006) (remanding case for determination as to whether student had made good faith effort to repay student loans).[8]

The Tennessee Legislature amended Tenn. Code Ann. § 40-29-202 in 2010 to require that

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[8] Even in *Harvey v. Brewer*, 605 F.3d 1067 (9th Cir. 2010), which upheld Arizona's re-enfranchisement scheme that requires full payment of restitution and court fines, the court expressly narrowed its ruling to addressing the facial challenge the plaintiffs raised and did not consider the constitutionality of the law as applied to indigent persons. *Harvey*, 605 F.3d at 1079 ("[W]e explicitly do not address challenges based on an individual's indigent status.").

applicants seeking restoration of their voting rights first pay all court costs associated with their sentence, in addition to restitution and child support obligations. The amended law also allows a waiver of the requirement that court costs be paid if the applicant can show he or she is indigent at the time of submitting the application. This exception, however, does not exist with respect to the restitution and child support provisions in the law.

As Judge Moore stated in her dissenting opinion, "when Tennessee decided to authorize re-enfranchisement, the state was prohibited from setting conditions on that re-enfranchisement that discriminate against those otherwise-eligible individuals solely on the basis of their ability to pay a particular sum." Pet. App. 39a-40a. The court of appeals' decision upholding the law as applied to indigents is in direct conflict with this Court's jurisprudence.

C. Tennessee's Re-enfranchisement Law Also Violates The Equal Protection Clause By Denying Otherwise Eligible Individuals The Right To Vote Based On Unpaid Child Support Payments Unrelated To Their Underlying Conviction And Sentence.

In upholding the child support requirement for restoration of voting rights, the court of appeals held "the statutory re-enfranchisement conditions need only further a legitimate government interest – not a legitimate government interest specifically tied to the state's authority for the initial

disenfranchisement." Pet. App. 17a. Thus, the court ruled that states may condition the restoration of voting rights on satisfaction of monetary obligations unrelated to a person's underlying conviction and sentence.

That ruling goes beyond anything this Court has held and, specifically, finds no support in *Richardson v. Ramirez*, 418 U.S. 24 (1974). *Richardson*'s holding that "the exclusion of felons from the vote has an affirmative sanction in [§] 2 of the Fourteenth Amendment," 418 U.S. at 54, did not involve a re-enfranchisement law. More to the point, the decision in *Richardson* rested on a state's ability to deny voting rights to those convicted of a crime, not to those involved in civil suits. Here, none of the petitioners was convicted of a crime involving the failure to pay child support.

In *Hill v. Stone*, 421 U.S. 289, 299 (1975), this Court reasoned that "the use of the franchise to compel compliance with other, independent state objectives is questionable in any context." *See also Carrington v. Rash*, 380 U.S. 89, 96 (1965) ("States may not casually deprive a class of individuals of the vote because of some remote administrative benefit to the State"); *Harman v. Forssenius*, 380 U.S. 528, 542 (1965) ("constitutional deprivations may not be justified by some remote administrative benefit to the State"). As explained in *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 446 (1985), even in the absence of heightened scrutiny, "[t]he State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." If the failure or inability to pay child support did not serve

as a basis to disenfranchise the petitioners, it cannot serve as a basis to continue their disenfranchisement after they have completed their criminal sentences.

This Court has viewed such efforts skeptically in other contexts, as well. For example, in *Zablocki v. Redhail*, 434 U.S. 374 (1978), the Court held that a Wisconsin statute that denied the fundamental right to marry to individuals who had outstanding child support obligations violated the equal protection clause. Of particular relevance here, the Court ruled that Wisconsin's law could not be justified merely because it might, in some instances, provide an incentive for individuals to make support payments. 434 U.S. at 389. Furthermore, this Court has ruled that, if there are alternative means available to achieve the state's interests without burdening the ability to vote, the State must choose those "less drastic means." *Dunn*, 405 U.S. at 343 (citing *Shelton v. Tucker*, 364 U.S. 479, 488 (1960)). Given the other means available for collecting child support, Tennessee's requirement is unreasonable and unnecessary. *See* Tenn. Code Ann. § 36-5-901 (permitting the execution of a lien on a person's real or personal property for failure to pay child support); Tenn. Code Ann. §§ 36-5-1102-1106 (allowing the garnishment of a person's wages to collect child support).

For people with felony convictions who do not owe court fines or restitution associated with their sentence but owe outstanding child support as a result of a civil order, their outstanding child support payments serve as the only barrier to getting their voting rights restored. Based on the court of appeals' decision, a state could impose any financial debt – a

credit card bill, a car note, a mortgage payment – as a barrier to the restoration of voting rights. If the decision below is allowed to stand, states could expand their disenfranchisement laws to cover non-criminal behavior. This Court's decisions do not allow that result.

II. THE DECISION BELOW REGARDING THE MEANING AND SCOPE OF THE TWENTY-FOURTH AMENDMENT CONFLICTS WITH THIS COURT'S DECISION IN *HARMAN V. FORSSENIUS*.

The court of appeals rejected the petitioners' Twenty-Fourth Amendment claim on the ground that "[t]he re-enfranchisement law does not condition the right to vote on payment of restitution or child support, but instead conditions the restoration of a felon's right to vote on such payments – a state regulatory arrangement the Twenty-Fourth Amendment says nothing about." Pet. App. 18a.[9] The court's decision was incorrect in light of this Court's decision in *Harman*.

Harman is the only case in which this Court has reviewed the constitutionality of a state election

[9] The court of appeals relied, in part, on the Ninth Circuit's decision in *Harvey v. Brewer*, 605 F.3d 1067 (9th Cir. 2010), in which that court rejected a similar Twenty-Fourth Amendment challenge to Arizona's re-enfranchisement scheme that conditions the restoration of voting rights on the payment of court fines and restitution, and the Fourth Circuit's decision in *Howard v. Gilmore*, No. 99-2285, 205 F.3d 1333, 2000 WL 203984 (4th Cir. 2000), which upheld a state law under the Twenty Fourth Amendment that required applicants seeking restoration of their voting rights to pay a $10 application fee.

law under the Twenty-Fourth Amendment.[10] This Court held in *Harman* that a Virginia law which imposed, as a precondition to vote, either the payment of a poll tax or the filing of a certificate of residence violated the Twenty-Fourth Amendment. 380 U.S. at 533.[11] Given the legislative history behind the Twenty-Fourth Amendment, the *Harman* Court concluded that Congress had a "general repugnance to the disenfranchisement of the poor occasioned by failure to pay the tax," and that Congress was concerned that states were "exact[ing] a price for the privilege of exercising the franchise." *Id.* at 539. The amendment's primary purpose was to eliminate wealth as a factor in voting and to encourage the electorate to be more active in the political process. *Id.* at 539. Congress likened the poll tax to property ownership requirements and concluded that a person's economic status is an invalid voter qualification. *See* 87 Cong. Rec. 17657 (1962) (in a senate floor debate, one of the amendment's proponents stated "the payment of money . . . should never be permitted to reign as a criterion of democracy.").

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[10] In *Morse v. Republican Party of Virginia*, 517 U.S. 186 (1996), the plaintiffs raised a claim under the poll tax provision of the Voting Rights Act (42 U.S.C. § 1973h), the language of which mirrors the Twenty-Fourth Amendment. The district court dismissed the claim on the ground that no private right of action existed under the provision. 517 U.S. at 234. This Court reversed the lower court's ruling and remanded the case for further proceedings without reaching the merits of the plaintiffs' poll tax claim. *Id.* at 234-235.

[11] The Court found that the alternative of filing a certificate of residence did not redeem the otherwise unconstitutional poll tax. *Id.* at 540-42.

Not only is the court of appeals' decision inconsistent with the holding in *Harman*, the court's ruling undermines Congress' clear intent behind enacting the Twenty-Fourth Amendment. As Judge Moore noted in her dissent, the state's requirement operates in the same manner as a poll tax because failure to pay the debt results in the continued denial of voting rights. Pet. App. 76a. ("[A]lthough the payments here may be reasonably justified outside the election context, they are completely without a function in the State's administration of federal elections.").

The majority below disputed the characterization of the challenged statutes as a tax. However, this Court has taken a more expansive view, defining the word "tax" as "an enforced contribution to provide for the support of government." *United States v. Reorganized CF & I Fabricators of Utah, Inc.*, 518 U.S. 213, 224 (1996) (citing *United States v. La Franca*, 282 U.S. 568, 572 (1931)). Under Tennessee law, at least some portion of the restitution and child support payments directly benefit the state by financing the administration of government functions and programs. With respect to child support, county clerks may charge five percent of the sum for all payments they receive for the handling and disbursement of such payments. Tenn. Code Ann. § 8-21-403(a). As for restitution, courts often include a restitution order in a criminal sentence even when there is no victim. In the federal system, for example, defendants pay sixty-five percent of the total restitution order to state agencies that administer crime victim assistance programs, and thirty-five percent of the money goes to a state entity

responsible for overseeing substance abuse programs. 18 U.S.C. § 3663(c). At least in some instances, therefore, the state enjoys a direct pecuniary benefit from collecting restitution and child support. Pet. App. 68a. ("[A]t the most fundamental level, § 40-29-202(b) and (c) operate in the same manner as the indisputably forbidden 'poll tax' - they both require an individual who desires to vote to pay a monetized sum as an absolute condition to casting a ballot in a federal election.").[12]

In practice, Tennessee's requirement that people pay all restitution and be current on child support payments is precisely the "disenfranchisement of the poor" that Congress sought to eliminate and the type of "other tax" Congress abolished with passage of the Twenty-Fourth Amendment. *Harman*, 380 U.S. at 539. The requirement is an absolute bar for those who are otherwise eligible to vote but cannot afford to satisfy their debts. Because the Twenty-Fourth Amendment prohibits a state's camouflaged attempts to condition the right to vote on the payment of any fee, *Harman*, 380 U.S. at 540-41, the decision below merits this Court's consideration.

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[12] The Sixth Circuit, in *Wright v. McClain*, 835 F.2d 143, 144-145 (6th Cir. 1987), ruled that payments by parolees into a supervision fund and victim's compensation fund constituted "taxes" because "[t]he purposes of the charges are to defray the cost to the general public of monitoring and supervising the behavior of convicted offenders and to compensate, in some measure, victims of criminal misconduct." The court defined a "tax" as an assessment designed for the purpose of raising revenue for the state. 835 F.2d at 145.

III. THE COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF STATE LAW THAT CONFLICTS WITH DECISIONS OF THE TENNESSEE SUPREME COURT PROHIBITING LAWS THAT RETROACTIVELY EXPAND A CONVICTED PERSON'S PERIOD OF DISENFRANCHISEMENT.

In addition to rejecting petitioners' federal constitutional claims, the court of appeals also concluded that Tennessee's requirement that restitution and child support be paid as a condition to restoring a convicted person's right to vote is non-punitive in its purpose and application and, therefore, does not violate the state's ex post facto clause. Pet. App. 24a. The Tennessee Supreme Court, conversely, has held that disenfranchisement laws are "penal in nature." *May v. Carlton*, 245 S.W.3d at 349. In the petitioners' case, the retroactive application of Tennessee's restitution and child support requirements increases their punishment by extending their period of disenfranchisement. Based on the Tennessee Supreme Court's own interpretation of the state's ex post facto clause, the court of appeals' decision was erroneous.[13]

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[13] Tennessee courts have described the state's ex post facto clause as providing greater protection than its federal counterpart. *See State v. Gibson*, No. E2003-02102-R3-CD, 2004 WL 2827000, at *3 n.6 (Tenn. Crim. App. Dec. 9, 2004) ("the Tennessee Constitution's Ex Post Facto Clause is more expansive than the one in Article I, Section 10 of the United States Constitution"); *Decker v. Carroll Academy*, No. 02A01-9709-CV-00242, 1999 WL 332705, at *12 (Tenn. Ct. App. May 26, 1999) (same).

In *May v. Carlton*, the Tennessee Supreme Court ruled that "laws disenfranchising convicted felons are penal in nature." 245 S.W.3d at 349. Prior to *May*, the Tennessee Supreme Court already had ruled that the state's ex post facto clause prohibits the General Assembly from retroactively disenfranchising people with felony convictions who remained eligible to vote at the time of their sentencing. *Gaskin v. Collins*, 661 S.W.2d 865 (Tenn. 1983).[11] Judge Moore in her dissent concluded that, "the Tennessee Supreme Court, in light of *May*, would view any law that works to restrict further a felon's right to vote by, for example, conditioning that right on the payment of money, as equally punitive." Pet. App. 82a.

The court of appeals, however, ruled that the Tennessee Supreme Court's finding that disenfranchisement laws are penal in nature was "pure dicta" and, therefore, not binding. Pet. App. 25a. The majority purported to justify this ruling by stating that *Gaskin* "provides no support for *May*'s observation that '[l]aws disenfranchising convicted felons are penal in nature,'" and that "the 'penal in nature' statement [is not] supported by other law or logic in the opinion." Pet. App. 25a. As a result, the court of appeals disregarded the Tennessee Supreme Court's unambiguous decisions in *May* and *Gaskin*,

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[11] The petitioners requested that the panel take judicial notice of election training materials state officials prepared following the 2006 changes to the law. In one of the documents, the state clearly took the position that *Gaskin* still applies and that individuals convicted during a certain time period are exempt from all of the requirements set forth in the law. *See* C.A. App. 25-26..

and improperly substituted its own interpretation of the state's Ex Post Facto Clause for that of the state supreme court.

It is settled that federal courts are bound by a state supreme court's interpretation of state law. *Ward v. Rock Against Racism*, 491 U.S. 781, 795-96 (1989) ("In evaluating a facial challenge to a state law, a federal court . . . must consider any limiting construction that a state court or enforcement agency has proffered.") (internal quotations omitted); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 381 (1992) ("In construing the St. Paul ordinance, we are bound by the construction given to it by the Minnesota [Supreme] Court."). In *Bradshaw v. Richey*, 546 U.S. 74 (2005), this Court reversed a decision from the Sixth Circuit in which the court of appeals misapplied Ohio's law regarding transferred intent in a felony murder case. This Court ruled "[t]he Ohio Supreme Court's interpretation [of the law] . . . directly contradicts the Sixth Circuit's analysis," and the court of appeals' ruling was "a flatly countertextual interpretation of what the Ohio Supreme Court said." *Id.* at 76-77. Moreover, even if a state supreme court's view of state law appears to be dicta, it is still binding on a federal court if the explanation of state law is clear and unambiguous. *Id.* at 76.

The court of appeals clearly disagreed with the decision in *May*, but was nonetheless bound to follow it. By ignoring the Tennessee Supreme Court's clear interpretation of state law, the court of appeals exceeded its judicial authority and violated basic principles of federal-state comity. This Court should

review the decision below to correct that fundamental error.[15]

IV. THE QUESTIONS PRESENTED ARE OF NATIONAL IMPORTANCE, AND THIS CASE IS AN APPROPRIATE VEHICLE FOR RESOLVING THEM.

Tennessee's law and similar laws of other states codify and legitimize a system of second class citizenship based on wealth. As of now, Tennessee is the only state to condition the restoration of voting rights on the payment of fees that are unrelated to a person's underlying conviction and sentence. However, there are over thirty states that require payment of restitution and/or court costs as a condition to vote.

It is estimated that more than 94,000 people in Tennessee are disenfranchised.[16] Overall, the United States' incarceration rate has increased more than sevenfold since 1868 when Section 2 of the Fourteenth Amendment was ratified, and has significantly risen since the 1970s.[17] The

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[15] While petitioners maintain the rulings in *May* and *Gaskin* foreclose the state's retroactive application of Tenn. Code Ann. §§ 40-29-202(b) and (c), to the extent the court of appeals concluded the Tennessee courts have been silent on this issue, the court could have certified the question to the Tennessee Supreme Court pursuant to Tennessee Supreme Court Rule 23.

[16] *See* The Sentencing Project Interactive Map, http://www.sentencingproject.org/map/map.cfm.

[17] *See* Jamie Fellner and Marc Mauer, Human Rights Watch and The Sentencing Project, *Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States*, p. 14, n.44.

Department of Justice estimates that there are two million people currently incarcerated, and over five million people under some form of criminal supervision.[18] Numerous studies show that low income people are overly represented in the criminal justice system and, for many, orders to pay restitution and court fines are part of their sentences. Poor people bear the brunt of disenfranchisement laws and are less capable of satisfying orders of restitution and payment of court fines than more affluent individuals. Moreover, because of the fast rate at which interest accrues on these monetary obligations, the total amount a person owes can be grossly out of proportion with the original amount of restitution or court costs imposed.[19] Therefore, state laws that require satisfaction of these debts have a disparate impact on poor people and, in practical terms, can result in their permanent disenfranchisement.

This Court has not specifically addressed the constitutionality of state election laws that condition the restoration of voting rights on the payment of financial debts. However, this Court's jurisprudence in the areas of election law and criminal justice strongly weigh in favor of invalidating Tennessee's

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http://www.sentencingproject.org/tmp/File/FVR/fd_losingthevoe.pdf.

[18] *See* Bureau of Justice Statistics, Criminal Offenders Statistics, U.S. Department of Justice, http://bjs.ojp.usdoj.gov/index.cfm?ty=tp&tid=11.

[19] *See* ACLU National Prison Project, *In for a Penny: The Rise of America's New Debtors' Prisons*, http://www.aclu.org/files/assets/InForAPenny_web.pdf.

restitution and child support requirements. Absent this Court's intervention, states will remain free to erect financial barriers to the ballot box justified only by the claim that the people affected have criminal convictions and thus are not entitled to any constitutional protections. This case warrants the Court's review because such a rationale, at its core, violates this nation's most basic notions of democracy and fairness.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: March 15, 2011

APPENDIX

RECOMMENDED FOR FULL-TEXT PUBLICATION

Pursuant to Sixth Circuit Rule 206

File Name: 10a0335p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

TERRENCE JOHNSON, JIM HARRIS, JOSHUA ROBERTS,	)	
Plaintiffs-Appellants,	)	No. 08-6377
v.	)	
PHIL BREDESEN, Governor of the State of Tennessee; BROOK THOMPSON, Coordinator of Elections; RILEY DARNELL, Secretary of State of Tennesee; RICHARD HOLDEN, Administrator of Elections for Shelby County; KIM BUCKLEY, Administrator of Elections for Madison County; RAY BARRETT, Administrator of Elections for Davidson County, in their official capacities,	)	

)

Defendants-Appellees.)

Appeal from the United States District Court for the Middle District of Tennessee at Nashville. No. 08-00187 - Juliet E. Griffin, Magistrate Judge.

Decided and Filed: October 28, 2010

Before: MOORE and COOK, Circuit Judges; LUDINGTON, District Judge.*

COUNSEL

ON BRIEF: Nancy G. Abudu, Laughlin McDonald, AMERICAN CIVIL LIBERTIES UNION FOUNDATION, INC., Atlanta, Georgia, Tricia Herzfeld, AMERICAN CIVIL LIBERTIES UNION OF TENNESSEE, Nashville, Tennessee, for Appellants. Janet M. Kleinfelter, OFFICE OF THE TENNESSEE ATTORNEY GENERAL, Nashville, Tennessee, James I. Pentecost, Jon A. York, PENTECOST & GLENN, PLLC, Jackson, Tennessee, John L. Ryder, HARRIS SHELTON HANOVER WALSH, PLLC, Memphis, Tennessee, Danny Presley, OFFICE OF THE SHELBY

* The Honorable Thomas L. Ludington, United States District Judge for the Eastern District of Michigan, sitting by designation.

COUNTY ATTORNEY, Memphis, Tennessee, for Appellees.

COOK, J., delivered the opinion of the court, in which LUDINGTON, D. J., joined. MOORE, J. (pp. 17–55), delivered a separate dissenting opinion.

OPINION

COOK, Circuit Judge. Plaintiffs Terrence Johnson, Jim Harris, and Joshua Roberts[1]—all Tennessee residents and convicted felons—filed a complaint alleging that, by conditioning restoration of their voting rights on payment of court-ordered victim restitution and child support obligations, Tennessee's voter re-enfranchisement statute violates the Equal Protection Clause of the United States Constitution, the Twenty-

[1] As originally filed, the lawsuit's third plaintiff was an individual named Alexander Friedmann, who raised an additional due process claim pertinent only to himself. With the district court's approval, the plaintiffs amended the complaint to add Joshua Roberts as a fourth plaintiff. Friedmann eventually settled his dispute, but plaintiffs' counsel inadvertently included him (and excluded Roberts) in the notice of appeal. Counsel sought to correct this error by moving to dismiss Friedmann from this appeal and substitute Roberts. Defendants consent to this correction, and we now grant the motion.

Fourth Amendment, and the Ex Post Facto and Privileges or Immunities Clauses of the United States and Tennessee Constitutions. In a well-reasoned decision, the district court granted Defendants' motion for judgment on the pleadings, and Plaintiffs appealed. Finding no error, we affirm.

I.

All three plaintiffs reside in various Tennessee counties: Johnson in Shelby County, Harris in Madison County, and Roberts in Davidson County. A jury convicted Johnson of wire fraud in 1999, and the court sentenced him to a term of imprisonment and ordered him to pay $40,000 in restitution. He completed his prison term, but remains unable to satisfy the restitution order. In addition, he owes a significant amount (more than $1,000) in overdue child support payments. Similarly, multiple felony convictions yielded prison sentences for Harris and Roberts, both of whom owed pastdue child support obligations ($2,500 and $7,000, respectively) at the time they filed the complaint. Like Johnson, Harris and Roberts served their prison terms and are no longer on probation. Harris has since paid his overdue child support, and thus faces no impediment to applying for re-enfranchisement. He continues, however, to press a claim for nominal damages on account of any past constitutional harm.

The State of Tennessee, like many others, disenfranchises convicted felons, but provides them with a statutory procedure for regaining the

franchise upon completion of their sentences and satisfaction of certain conditions. The re-enfranchisement statute at issue, Tennessee Code § 40-29-202, restores felons' eligibility "to apply for a voter registration card and have the right of suffrage restored" upon receipt of a pardon, discharge from custody after serving the maximum sentence imposed, or final discharge by the relevant county, state, or federal authority. The statute, however, carves out two exceptions to re-enfranchisement eligibility. It provides that:

> (b) . . . a person shall not be eligible to apply for a voter registration card and have the right of suffrage restored, unless the person has paid all restitution to the victim or victims of the offense ordered by the court as part of the sentence[, and]
>
> (c) . . . a person shall not be eligible to apply for a voter registration card and have the right of suffrage restored, unless the person is current in all child support obligations.

Tenn. Code Ann. § 40-29-202(b)–(c). The Tennessee legislature added these two conditions in 2006; before that, felons could apply for re-enfranchisement notwithstanding any outstanding restitution or child support obligations.

Having completed their prison and probation terms, Plaintiffs claim that they desire to vote in upcoming elections but remain

ineligible to do so because of their unpaid restitution and child support obligations. They sued Defendants in the Middle District of Tennessee, challenging the constitutionality of the re-enfranchisement statute's restitution and child support provisions. Defendants sought judgment on the pleadings under Federal Rule of Civil Procedure 12(c), which the district court granted, finding that Plaintiffs' constitutional challenges lacked merit. Plaintiffs timely appealed.[2]

II.

On appeal, Plaintiffs claim that the district court erred in rejecting their challenges under the United States and Tennessee Constitutions. We review the district court's grant of a Rule 12(c) motion for judgment on the pleadings using the same de novo standard applicable to a motion to dismiss under Rule 12(b)(6). *Roger Miller Music, Inc. v. Sony/ATV Publ'g, LLC*, 477 F.3d 383, 389

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[2] Plaintiffs filed a motion asking this court to judicially notice two sets of responses to interrogatories. We fail to see how either document fits within Federal Rule of Evidence 201, which permits judicial notice of an adjudicative fact so long as it is "not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." *Sigler v. Am. Honda Motor Co.*, 532 F.3d 469, 476 (6th Cir. 2008) (quoting Fed. R. Evid. 201(b)). Accordingly, we deny the motion. We note, however, that even if considered, these documents would not affect our resolution of the merits.

(6th Cir. 2007). "For purposes of a motion for judgment on the pleadings, all well-pleaded material allegations of the pleadings of the opposing party must be taken as true, and the motion may be granted only if the moving party is nevertheless clearly entitled to judgment." *Tucker v. Middleburg-Legacy Place, LLC*, 539 F.3d 545, 549 (6th Cir. 2008) (quoting *JPMorgan Chase Bank, N.A. v. Winget*, 510 F.3d 577, 581 (6th Cir. 2007)).

A. Equal Protection

The Fourteenth Amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The Equal Protection Clause prevents states from making distinctions that (1) burden a fundamental right; (2) target a suspect class; or (3) intentionally treat one individual differently from others similarly situated without any rational basis. *Radvansky v. City of Olmsted Falls*, 395 F.3d 291, 312 (6th Cir. 2005). Plaintiffs argue that the district court erred by testing their equal protection challenge using the rational basis test, rather than strict scrutiny, because the re-enfranchisement statute: (1) burdens their fundamental right to vote; and (2) improperly discriminates against the indigent.

Plaintiffs' arguments miss the mark. The state may, within the bounds of the Constitution, strip convicted felons of their voting rights. *Richardson v. Ramirez*, 418 U.S. 24, 54 (1974). Having lost their voting rights, Plaintiffs lack any

fundamental interest to assert. *See Wesley v. Collins*, 791 F.2d 1255, 1261 (6th Cir. 1986) ("It is undisputed that a state may constitutionally disenfranchise convicted felons, and that the right of felons to vote is not fundamental." (citations omitted)). And contrary to Plaintiffs' other contention, wealth-based classifications do not discriminate against a suspect class. *See Papasan v. Allain*, 478 U.S. 265, 283–84 (1986); *Maher v. Roe*, 432 U.S. 464, 470–71 (1977). Accordingly, because Tennessee's re-enfranchisement law neither implicates a fundamental right nor targets a suspect class, the district court properly applied rational basis review, not strict scrutiny, to Plaintiffs' equal protection challenge. *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 29 (1973).

To survive rational basis scrutiny, the statute need only be "rationally related to legitimate government interests," *Doe v. Mich. Dep't of State Police*, 490 F.3d 491, 501 (6th Cir. 2007) (internal quotation marks and citation omitted), and "must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification," *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993). "[E]very reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895)). Where rational basis review governs, we will not strike down a statute on

equal protection grounds "unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational." *Vance v. Bradley*, 440 U.S. 93, 97 (1979). "A 'plaintiff may demonstrate that the government action lacks a rational basis . . . either by negativing every conceivable basis which might support the government action, or by demonstrating that the challenged government action was motivated by animus or ill-will.'" *Club Italia Soccer & Sports Org. v. Charter Twp. of Shelby, Mich.*, 470 F.3d 286, 298 (6th Cir. 2006) (alteration in original) (quoting *Warren v. City of Athens*, 411 F.3d 697, 711 (6th Cir. 2005)).

Defendants assert that the restitution and child-support-payment provisions in the re-enfranchisement statute advance legitimate interests of the state: protecting the ballot box from convicted felons who continue to break the law by failing to comply with court orders, encouraging payment of child support, and requiring felons to complete their entire sentences, including paying victim restitution. We find that the state's interests of encouraging payment of child support and compliance with court orders, and requiring felons to complete their entire sentences, including paying victim restitution, supply a rational basis for the challenged statutory provisions sufficient to pass constitutional muster. Certainly, Tennessee possesses valid interests in promoting payment of child support, requiring criminals to fulfill their

sentences, and encouraging compliance with court orders. *See Jones v. Helms*, 452 U.S. 412, 423 (1981) ("There can be no question about the legitimacy of the purpose to cause parents to support their children."); *Carter v. Lynch*, 429 F.2d 154, 157–58 (4th Cir. 1970) (upholding state civil arrest and release statutes as legitimate legislative functions "well within the State's power to secure enforcement of the judgments of its courts"); *Blackhawk Mining Co. v. Andrus*, 711 F.2d 753, 757–58 (6th Cir. 1983) (upholding statute requiring prepayment of proposed penalty assessments against due process challenge where government had legitimate interest in preventing collection problems and ensuring compliance with the law). The challenged provisions in the re-enfranchisement law bear, at a minimum, a direct and rational relationship to the advancement of those interests, and therefore withstand rational basis scrutiny.

Although Plaintiffs, who urge the court to apply strict scrutiny, fail to satisfy *their* burden of negating any conceivable rational basis for the restitution and child support provisions, *Michael v. Ghee*, 498 F.3d 372, 379 (6th Cir. 2007), the dissent formulates new rational basis arguments in an attempt to carry this burden for them. The dissent's efforts similarly fail.

The dissent agrees that rational basis review governs, but insists that § 40-29-202(b)–(c) cannot survive constitutional scrutiny even under this highly deferential standard. The dissent argues that "preconditioning suffrage on a

payment that a person is unable to make is [not] in any rational way related to the government's interest in promoting that payment." Dissent at 20. But the statute is not aimed at encouraging the collection of payments from *indigent* felons, but from *all* felons. The legislature may have been concerned, for instance, that a specific exemption for indigent felons would provide an incentive to conceal assets and would result in the state being unable to compel payments from some non-indigent felons. That the state used a shotgun instead of a rifle to accomplish its legitimate end is of no moment under rational basis review. *See E. Brooks Books, Inc. v. Shelby County, Tenn.*, 588 F.3d 360, 364 (6th Cir. 2009) ("[A] law will be sustained if it can be said to advance a legitimate government interest, even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous." (alternation in original) (quoting *Romer v. Evans*, 517 U.S. 620, 632 (1996))). While the dissent would prefer that the state not discriminate on the basis of wealth when providing statutory benefits, this is an argument that must be resolved by the legislature, not this Court.

Resisting this traditional rational basis analysis, the dissent cites *Zablocki v. Redhail*, 434 U.S. 374, 389 (1978), and *Bearden v. Georgia*, 461 U.S. 660, 662 (1983), two cases where "the Supreme Court . . . rejected a similar 'collection device rationale.'" Dissent at 20. Both cases are distinguishable.

In *Zablocki*, which concerned the fundamental right to marry, the Court applied *strict scrutiny* to strike down a state statute conditioning the ability to marry on the payment of child support obligations. Although *Zablocki* found the state's asserted interest in encouraging child support payments legitimate, it found that the statute was not "closely tailored to effectuate only [that] interest[]," *Zablocki*, 434 U.S. at 388, in light of the existence of "numerous other means for exacting compliance with . . . obligations," *id.* at 389. The dissent rightly notes that here, like *Zablocki*, other means (indeed, perhaps better means) exist for collecting restitution and child support payments. But whereas strict scrutiny guided the Court's analysis in *Zablocki*, rational basis guides our review. Ultimately, this standard proves determinative because "[t]he fact that other means are better suited to the achievement of governmental ends . . . is of no moment under rational basis review." *Tuan Anh Nguyen v. INS*, 533 U.S. 53, 77 (2001).

Like *Zablocki*, *Bearden v. Georgia* also proves inapposite due to its heightened standard of review. In *Bearden*, the Court held that Georgia could not revoke an individual's probation for failure to pay a fine or restitution absent evidence and findings that he was somehow responsible for the failure. The revocation of probation at issue in *Bearden* implicated physical liberty and effectively "turned a fine into a prison sentence." *Bearden*, 461 U.S. at 674. Although the parties "debate[d] vigorously whether strict scrutiny or rational basis [was] the

appropriate standard of review," *id.* at 665, the Court maintained that in that instance the issue could not be resolved by "pigeonhole analysis," but rather required "a careful inquiry into such factors as the nature of the individual interest affected, the extent to which it is affected, the rationality of the connection between legislative means and purpose, [and] the existence of alternative means for effectuating the purpose," *id.* at 666–67 (alteration in original) (quotation marks and citation omitted). Tennessee's re-enfranchisement conditions, by contrast, merely relate to the restoration of a civil right to which Plaintiffs have no legal claim, and invoke only rational basis review. *See Madison v. Washington*, 163 P.3d 757, 770 (Wash. 2007) (distinguishing *Bearden* and upholding, under rational basis review, a statute conditioning re-enfranchisement on completion of all terms of felons' sentences, including full payment of their financial legal obligations). With its differing standard of review, *Bearden* bears little on our analysis here.

Likewise inapposite are *Griffin v. Illinois*, 351 U.S. 12 (1956), *Williams v. Illinois*, 399 U.S. 235 (1970), and *James v. Strange*, 407 U.S. 128 (1972), three cases from the 1950s and 1970s that the dissent finds instructive regarding "the propriety of wealth-based distinctions." Dissent at 25. Each of these cases concerned fundamental interests subject to heightened scrutiny. Though the *Griffin* Court declined to specify its review standard, its analysis focused on the importance of the right of access to the courts. *See Griffin*, 351 U.S. at 19 ("Thus to deny adequate review to

the poor means that many of them may lose their life, liberty or property because of unjust convictions which appellate courts would set aside."); *Robinson v. Bd. of Regents*, 475 F.2d 707, 710 (6th Cir. 1973) (explaining how the existence of a fundamental right "triggered the application of [strict scrutiny]" in *Griffin*). And while the *Williams* Court similarly failed to articulate a precise standard of review, the fact that the case involved the denial of an indigent defendant's physical liberty appeared dispositive. *See Williams*, 399 U.S. at 262–63 (Harlan, J., concurring) ("[T]he presumption of regularity that comes with legislative judgment is one that is not equally acceptable in all instances, nor is it blind to the nature of the interest affected. . . . [T]his Court will squint hard at any legislation that deprives an individual of his liberty—his right to remain free."). Indeed, *Williams* held only that "a State may not constitutionally imprison beyond the maximum duration fixed by statute a defendant who is financially unable to pay a fine," without even reaching "the question whether a State is precluded in any other circumstances from holding an indigent accountable for a fine by use of a penal sanction." *Williams*, 399 U.S. at 243–44. And though *Strange*'s text appeared to apply rational basis review, the Court, concerned about discriminatory garnishment of the wages with which a debtor "supports himself and his family," found that the admittedly "legitimate" interests of the state paled in comparison to "the hopes of indigents for self-sufficiency and selfrespect." *Strange*, 407 U.S. at 135, 141–42; *see*

also Olson v. James, 603 F.2d 150, 154 (10th Cir. 1979) ("[I]t was the failure of the statute to protect the wages and the intimate personal property of the defendant from seizure and its consequent discouraging of independence and self-sufficiency . . . that brought the Court to the conclusion that the provisions constituted a violation of the equal protection clause."). Plaintiffs here assert no comparable interest triggering a heightened standard of review, but, instead, the mere "statutory benefit" of re-enfranchisement. *Harvey v. Brewer*, 605 F.3d 1067, 1079 (9th Cir. 2010).

Over the years, the Court has propounded inconsistent iterations of the rational basis standard. In *United States Railroad Retirement Board v. Fritz*, the Court acknowledged its usage of different rational basis formulations, referencing a collection of cases—including *Strange*—and noting that even "[t]he most arrogant legal scholar would not claim that all of these cases applied a uniform or consistent test under equal protection principles." 449 U.S. 166, 177 n.10 (1980). We believe that our application of the test aligns with this Circuit's and the Supreme Court's most recent pronouncements on the rationality standard, namely, that a "law will be sustained if it can be said to advance a legitimate government interest, even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous." *E. Brooks Books, Inc. v. Shelby County*, 588 F.3d 360, 364 (6th Cir. 2009) (quoting *Romer*

v. Evans, 517 U.S. 620, 632 (1996)).[3] Our application also aligns with various courts' applications of rational basis review to laws premising the restoration of the right to vote upon felons' completion of certain conditions. *See, e.g.*, *Harvey*, 605 F.3d 1067; *Hayden v. Paterson*, 594 F.3d 150 (2d Cir. 2010); *Owens v. Barnes*, 711 F.2d 25 (3d Cir. 1983); *Madison*, 163 P.3d 757. For example, in *Hayden v. Paterson*, the Second Circuit, though recognizing that "there remains some oddity in the laws in that those who have finished their prison terms, but are still on parole, are denied the right to vote while those with suspended sentences are not," denied the plaintiffs' equal protection challenge because "rational basis review allows legislatures to act incrementally and to pass laws that are over (and under) inclusive without violating the Fourteenth Amendment." 594 F.3d at 171.

Finally, the dissent advances an "additional reason" why it finds § 40-29-202(c) "constitutionally suspect," Dissent at 29, namely, that the child-support-payment condition fails to

[3] It is worth noting that Tennessee courts expressly take into account "ability to pay" when calculating restitution and child support awards. Tenn. Code Ann. § 40-35-304(d) ("In determining the amount and method of payment or other restitution, the court shall consider the financial resources and future ability of the defendant to pay or perform."); *Ford v. Ford*, No. 01A01-9611-CV-00536, 1998 WL 730201, at *2 (Tenn. Ct. App. Oct. 21, 1998) ("Tennessee's child support guidelines establish a rebuttable presumption of a minimum acceptable amount of support based on the noncustodial parent's ability to pay.")

relate directly to the state's reason for stripping individuals of the franchise in the first place—i.e., the underlying felony conviction. The dissent culls this direct-relationship constitutional requirement from *Richardson v. Ramirez* and *Hunter v. Underwood*, 471 U.S. 222 (1985). But *Richardson* and *Hunter* instruct that the state's authority to disenfranchise derives from an individual's commission of a qualifying crime and do not, as the dissent suggests, speak to franchise return. *Richardson*, 418 U.S. at 54; *Hunter*, 471 U.S. at 233. Rather, well-settled equal protection principles provide that the statutory re-enfranchisement conditions need only further a legitimate government interest—not a legitimate government interest specifically tied to the state's authority for the initial disenfranchisement. *Vance*, 440 U.S. at 97 (finding that legislature's actions must qualify as irrational to fail rational basis review).

B. Twenty-Fourth Amendment

The Twenty-Fourth Amendment proscribes any denial or abridgement of the right to vote for "failure to pay any poll tax or other tax." U.S. Const. amend. XXIV. Passed in 1962 and ratified two years later, the Twenty-Fourth Amendment exists to combat the "disenfranchisement of the poor . . . ." *Harman v. Forssenius*, 380 U.S. 528, 539 (1965). Plaintiffs claim that the restitution and child-support-payment provisions amount to unlawful poll taxes because they condition the restoration of voting rights on monetary

payments Plaintiffs are unable to make. This argument fails for several reasons.

First, and most fundamentally, the re-enfranchisement law at issue does not deny or abridge any rights; it only restores them. As convicted felons constitutionally stripped of their voting rights by virtue of their convictions, Plaintiffs possess no right to vote and, consequently, have no cognizable Twenty-Fourth Amendment claim. *Harvey*, 605 F.3d at 1080. The challenged provisions do not disenfranchise them or anyone else, poor or otherwise; Tennessee's indisputably constitutional disenfranchisement statute accomplished that. *See Richardson*, 418 U.S. at 54. The re-enfranchisement law does not condition the right to vote on payment of restitution or child support, but instead conditions the restoration of a felon's right to vote on such payment—a state regulatory arrangement the Twenty-Fourth Amendment says nothing about. *See Harvey*, 605 F.3d at 1080 (affirming dismissal of claim by disenfranchised felons that Arizona's disenfranchisement scheme violated the Twenty-Fourth Amendment by requiring the payment of any fine or restitution before restoration of voting rights); *Howard v. Gilmore*, No. 99-2285, 2000 WL 203984, at *2 (4th Cir. Feb. 23, 2000) (per curiam) (affirming dismissal of claim by disenfranchised felon that $10 fee for initiating restoration of civil rights, including voting, constituted an unconstitutional poll tax in violation of the Twenty-Fourth Amendment because "it is not his right to vote upon which payment of a fee is being conditioned;

rather, it is the restoration of his civil rights upon which the payment of a fee is being conditioned").

Second, even if the Twenty-Fourth Amendment applied to Tennessee's reenfranchisement law, the provisions requiring payment of restitution and child support do not represent taxes on voting imposed by the state, and therefore do not violate the Amendment's terms. *See Coronado v. Napolitano*, No. CV-07-1089-PHX-SMM, 2008 WL 191987, at *5 (D. Ariz. Jan. 22, 2008) (rejecting Twenty-Fourth Amendment challenge to restitution payment requirement). Unlike poll taxes, restitution and child support represent legal financial obligations Plaintiffs themselves incurred. *See Harvey*, 605 F.3d at 1080 ("That restoration of [disenfranchised felons'] voting rights requires them to pay all debts owed under their criminal sentences does not transform their criminal fines into poll taxes."). By exercising its "power to fix qualifications," *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 668 (1966), Tennessee permissibly limits the vote to individuals without felony convictions, *Richardson*, 418 U.S. at 56, and lawfully conditions the restoration of voting rights on satisfaction of such court-ordered obligations that exist independently of the re-enfranchisement statute or any tax law violations. Thus, even if the Twenty-Fourth Amendment applies, Tennessee's reenfranchisement statute does not violate it because the restitution and child-supportpayment provisions fail to qualify as the sort of taxes the Amendment seeks to prohibit.

C. Privileges or Immunities

Largely dormant since the Supreme Court's decision in the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872), significantly restricted its reach, *see Craigmiles v. Giles*, 312 F.3d 220, 229 (6th Cir. 2002), the Privileges or Immunities Clause of the Fourteenth Amendment prohibits states from abridging the privileges or immunities of national citizenship. U.S. Const. amend. XIV, § 1. As the district court correctly observed, no authority recognizes the right to vote in federal elections as a privilege or immunity of United States citizenship. Indeed, dicta in several historical Supreme Court cases suggest the opposite. *See Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 178 (1874); *Pope v. Williams*, 193 U.S. 621, 632 (1904), *amended by Dunn v. Blumstein*, 405 U.S. 330, 337 n.7 (1972). But in any event, even if voting qualifies as a privilege or immunity of citizenship, Plaintiffs fail to state a claim because, under the Supreme Court's holding in *Richardson*, the Constitution authorizes the complete abrogation of felons' voting rights. 418 U.S. at 56. Accordingly, we find that the district court correctly rejected Plaintiffs' privileges or immunities argument because adopting it would require the absurd holding that § 1 of the Fourteenth Amendment proscribes the very same practice the Supreme Court expressly deemed permissible under § 2 of that same amendment.

D. Tennessee Ex Post Facto

In the district court, Plaintiffs challenged the restitution and child-supportpayment provisions under the Ex Post Facto Clauses of both the U.S. and Tennessee Constitutions, which prohibit the enactment of any law that imposes punishment for an act after its commission, or imposes additional punishment to that previously prescribed. *Weaver v. Graham*, 450 U.S. 24, 28 (1981); U.S. Const. art. I, § 10; Tenn. Const. art. I, § 11. The district court rejected both claims, and Plaintiffs appeal only the rejection of their Tennessee constitutional claim.

Analysis of ex post facto claims involves a two-part inquiry. First, we ask whether the challenged law constitutes a civil, regulatory measure, or, instead, a punitive one. *Smith v. Doe*, 538 U.S. 84, 92 (2003). To answer this question, we look to "whether the legislature, in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other." *Hudson v. United States*, 522 U.S. 93, 99 (1997) (internal quotation marks and citation omitted). If we answer "punitive," then the inquiry ends with a determination that the law violates the Ex Post Facto Clause. *See Smith*, 538 U.S. at 92–93. Second, even if the legislature intended to classify the law as civil, we still must ask whether "the statutory scheme was so punitive either in purpose or effect as to negate that intention." *United States v. Ward*, 448 U.S. 242, 248–49 (1980). The non-exclusive and non-dispositive seven-factor analysis developed in *Kennedy v. Mendoza-Martinez*, guides this inquiry. 372 U.S. 144, 168–69 (1963). "'[O]nly the

clearest proof' will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty." *Hudson*, 522 U.S. at 100 (quoting *Ward*, 448 U.S. at 249).

When it enacted § 40-29-202(b)–(c), the Tennessee legislature did not explicitly disclose either a civil or punitive intention. Although it situated the challenged provisions in the "Criminal Procedure" volume of the Tennessee Code, the specific chapter bears the title "Restoration of Citizenship," which serves a civil, non-punitive purpose—namely, regulating the process through which felons may regain the right to vote. Indeed, the law's statutory neighbor, § 40-29-203, also in the "Restoration of Citizenship" chapter, establishes a procedure for a felon's application for and the state's issuance of a voter registration card—a process obviously unrelated to punishment. That the legislature chose to put § 40-29-202 in the "Criminal Procedure" title makes it no more punitive than other chapters found in the same title, such as chapter 14, which establishes procedures for the appointment of counsel for indigents; chapter 27, which covers procedures for pardons; or chapter 30, which entitles convicts to request DNA analysis of evidence. In other words, although the statute here, like others located in the "Criminal Procedure" title, relates to the criminal justice system, its purpose may nevertheless be non-punitive. Finding no evidence that the legislature enacted the challenged provisions with punitive intentions, we turn to the second part of the ex post facto inquiry: examining whether the

statute's purpose or effect negated the legislature's non-punitive intentions.

Our examination—using the applicable *Mendoza-Martinez* factors—finds no contradiction of the legislative non-punitive intent in the statute's purpose or effect. Nothing in the record suggests a historically punitive characterization of reenfranchisement schemes; indeed, Plaintiffs fail to cite a case supporting such treatment. Nor does the statute promote the traditional aims of punishment, since it only restores rights originally stripped by the disenfranchisement statute. Significantly, Tennessee child support law, which conditions payment on the payor's ability to earn a living so as to *avoid* imposing a penal obligation, exists to protect children; and restitution payments aim to restore crime victims to the position they would have been in had the crime not occurred—not to punish the perpetrator. Moreover, the law resists classification as one imposing an affirmative disability—if Plaintiffs suffer from an affirmative disability, the disenfranchisement statute must take the blame. And, as discussed in the equal protection analysis, the restitution and child-support-payment provisions bear a rational connection to legitimate non-punitive interests of the state, and are not excessive with regard to those purposes. *See Mendoza-Martinez*, 372 U.S. at 168–69 (discussing factors).

Moreover, in *Trop v. Dulles*, the Supreme Court expressly stated that felon disenfranchisement laws serve a regulatory, non-

penal purpose. 356 U.S. 86, 96–97 (1958). Accordingly, as a matter of federal law, disenfranchisement statutes do not violate the Ex Post Facto Clause of the U.S. Constitution. It necessarily follows that, if the laws that strip convicted felons of their voting rights in the first instance fail to qualify as punitive, then those that subject restoration to the fulfillment of certain conditions do not either. Like the Supreme Court's disenfranchisement example in *Trop*, Tennessee's re-enfranchisement statute serves "to designate a reasonable ground of eligibility for voting," and thus qualifies "as a nonpenal exercise of the power to regulate the franchise." *See id.* Plaintiffs raise no challenge to this analysis; in fact, they declined to appeal the district court's ruling on their federal ex post facto claim. They argue, however, that the re-enfranchisement law deserves precisely the opposite treatment under Tennessee's Ex Post Facto Clause because the Tennessee Supreme Court recently held that "[l]aws disenfranchising convicted felons are penal in nature." *May v. Carlton*, 245 S.W.3d 340, 349 (Tenn. 2008); *see also Gaskin v. Collins*, 661 S.W.2d 865, 868 (Tenn. 1983).

Plaintiffs mistakenly rely on *May*. *May* held that for purposes of Tennessee's habeas corpus statute, illegal disenfranchisement is a "restraint on liberty." *May*, 245 S.W.3d at 342 (internal quotation marks omitted). The court then granted the petitioner relief under Tennessee's habeas corpus statute because the law at issue retroactively labeled petitioner's

crime "infamous" and thereby disenfranchised him—which is impermissible under Tennessee law. *Id.* at 349 (citing *Gaskin*, 661 S.W.2d at 867). Other than citing *Gaskin*, *May* does not explain why this result is impermissible. *See id.* *Gaskin*, however, did not hold that laws retroactively disenfranchising felons are impermissible because they violate the Ex Post Facto Clause (Article I, Section 11) of the Tennessee Constitution. Rather, *Gaskin* held such laws to be impermissible because they violate Article I, Section 5 of the Tennessee Constitution, a section specifically related to elections and prompted by Tennessee's civil war history. *Gaskin*, 661 S.W.2d at 866–68. To be sure, the *May* petitioner argued laws retroactively disenfranchising felons violate Tennessee's Ex Post Facto Clause (in addition to Article I, Section 5). *See May*, 245 S.W.3d at 342. Yet, this is not the holding of *May* or *Gaskin*. *Gaskin* therefore provides no support for *May*'s observation that "[l]aws disenfranchising convicted felons are penal in nature." *May*, 245 S.W.3d at 349. Neither is the "penal in nature" statement supported by other law or logic in the opinion. The "penal in nature" statement is pure dicta, insufficient to compel the conclusion that *either* laws retroactively disenfranchising felons *or* laws regulating re-enfranchisement violate the Ex Post Facto Clause of the Tennessee Constitution.

III.

For these reasons, we affirm.

DISSENT

KAREN NELSON MOORE, Circuit Judge, dissenting. A state under current law may curtail a felon's right to vote, or even forever deny it, but once a state enacts a process by which a felon may regain suffrage, that process must comport with the demands of the Constitution. Contrary to the majority's conclusion, I would hold that Tennessee Code § 40-29-202(b) and (c) violate the Equal Protection Clause of the U.S. Constitution and the Ex Post Facto Clause of the Tennessee Constitution. I further believe that the Plaintiffs have alleged sufficient factual matter to state a claim for relief under the Twenty-Fourth Amendment to the U.S. Constitution such that dismissal on the pleadings was improper. For the following reasons, I must respectfully dissent.

Tennessee Code § 2-19-143 and § 40-20-112 disenfranchise all persons who have been convicted of "infamous" crimes, i.e., felonies. Those felons denied the right to vote are "eligible to apply for a voter registration card and have the right of suffrage restored" if they receive a pardon, are discharged from custody after serving the maximum sentence imposed, or are granted a final discharge from supervision by the relevant county, state, or federal authority. Tenn. Code Ann. § 40-29-202(a)(1)–(3) (2006). Notwithstanding this provision, however, there are two pecuniary preconditions to

reenfranchisement: "[A] person shall not be eligible to apply for a voter registration card and have the right of suffrage restored, unless the person has paid all restitution to the victim or victims of the offense ordered by the court as part of the sentence," *id.* § 40-29- 202(b), and "unless the person is current in all child support obligations," *id.* § 40-29- 202(c). Prior to 2006, felons adjudged to have committed infamous crimes were eligible to vote upon the completion of their sentences despite any outstanding financial obligations.

In the instant case, the Plaintiffs are individuals who have completed the imprisonment associated with the felonies for which the State was authorized to abridge their right to vote. Yet because of their *inability* to pay outstanding restitution and/or child-support arrears, the State continues to deny them the right of suffrage to which they otherwise would be entitled automatically were the law the same now as it was at the time of their convictions and initial disenfranchisement. It is indisputable that the Plaintiffs are now unable to access the ballot box simply because they are too poor to pay.

I.

A. Equal-Protection Claim

The Equal Protection Clause of the Fourteenth Amendment prohibits states from making distinctions that "burden a fundamental

right, target a suspect class, or intentionally treat one differently from others similarly situated without any rational basis for the difference." *Radvansky v. City of Olmsted Falls*, 395 F.3d 291, 312 (6th Cir. 2005). The precise level of scrutiny that a court will provide a challenged provision "depend[s] upon the interest affected or the classification involved." *Dunn v. Blumstein*, 405 U.S. 330, 335 (1972). Those laws that burden a fundamental right or target a suspect class will be "subject to strict scrutiny, and will be upheld only when they are narrowly tailored to a compelling governmental interest." *Does v. Munoz*, 507 F.3d 961, 964 (6th Cir. 2007) (internal quotation marks omitted). A law that "neither burdens a fundamental right nor targets a suspect class" must "bear[] a rational relation to some legitimate end." *Romer v. Evans*, 517 U.S. 620, 631 (1996). "[T]he Equal Protection Clause is satisfied as long as there is a plausible policy reason for the classification . . . and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational." *Nordlinger v. Hahn*, 505 U.S. 1, 11 (1992) (internal citations omitted); *see City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985) ("The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational.").

I agree with the majority as to some components of its equal-protection analysis. I agree that the Plaintiffs in this case have no fundamental right to vote under existing case

law. *See Wesley v. Collins*, 791 F.2d 1255, 1261 (6th Cir. 1986) (citing, among other cases, *Richardson v. Ramirez*, 418 U.S. 24, 26 (1974)). I also agree that the Plaintiffs' membership in "a class of less wealthy individuals is not a suspect class" under prevailing precedent. *Molina-Crespo v. U.S. Merit Sys. Prot. Bd.*, 547 F.3d 651, 660 (6th Cir. 2008) (citing *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 29 (1973)). Given these two conclusions, I must also agree that, because the Tennessee provisions neither burden a fundamental right nor discriminate against a suspect class, the Plaintiffs bear the burden to show that § 40-29-202(b) and (c) bear no rational relationship to any legitimate government end. *See FCC v. Beach Comme'ns, Inc.*, 508 U.S. 307, 315 (1993).

Where my agreement with the majority ends, however, is with its conclusion that the Tennessee provision requiring full payment of all outstanding child-support arrears prior to the restoration of suffrage—regardless of whether the individual is able to pay—satisfies this rational-basis inquiry. Although "[o]nly a handful of provisions have been invalidated for failing rational basis review," *Craigmiles v. Giles*, 312 F.3d 220, 225 (6th Cir. 2002), the absence of any policy justification for the distinction in the instant case, as well as Supreme Court precedent addressing the propriety of provisions that discriminate on the basis of wealth, compel the conclusion that this is one of those instances. Simply put, Tennessee has no rational basis for denying voting rights to only those felons with

outstanding financial obligations, despite their inability to pay.

1. Section 40-29-202(b) and (c) Are Not Rationally Related to Any Legitimate Interest

The statutory provisions at issue in the instant case, § 40-29-202(b) and (c), preclude individuals, like the Plaintiffs, who are unable to satisfy all outstanding restitution orders and child-support arrears from regaining the franchise. The majority credits Tennessee's purported justifications for the provision, specifically concluding that § 40-29-202(b) and (c) are constitutionally sound because Tennessee has a legitimate interest in "encouraging payment of child support," "encouraging compliance with court orders," "protecting the ballot box from convicted felons who continue to break the law by failing to comply with court orders," and "requiring felons to complete" the financial obligations associated with their sentences. Maj. Op. at 6. I cannot agree that the provision restoring the franchise to only those felons who are affluent enough to satisfy their child-support arrears is rationally related to a legitimate government objective, and I believe that no policy reason supports the distinction in the instant case.

With respect to the first two policy justifications set forth by the majority, although Tennessee may seek to encourage the payment of child support, the payment of restitution, and

compliance with court orders by conditioning the restoration of suffrage on the respective payments, this explanation fails to consider that § 40-29- 202(b) and (c) are not restricted to just those persons who are unwilling to pay their arrears or restitution or comply with their court orders; instead, it includes individuals like the Plaintiffs who are simply *unable* to do so. Even acknowledging that Tennessee's proffered justifications for the law implicate legitimate state interests, I fail to see how preconditioning suffrage on a payment that a person is unable to make is in any rational way related to the government's interest in promoting that payment.

In fact, the Supreme Court has rejected a similar "collection device rationale" on at least two occasions. In *Zablocki v. Redhail*, for example, the Court confronted the constitutionality of a statute that required an applicant for a marriage license who had children from a previous relationship to "show[] that he ha[d] satisfied his courtdetermined support obligations to the prior children and that those children [would] not become public charges." *Zablocki v. Redhail*, 434 U.S. 374, 389 (1978). At oral argument, the State in *Zablocki* suggested that the statute was justified because it "provide[d] [an] incentive for the applicant to make support payments to his children." *Id.* The Court, however, rejected this rationale, stated that it could not "justify the statute's broad infringement on the right to marry" and emphasized that "with respect to individuals who are *unable* to meet the statutory requirements,

the statute merely prevents the applicant from getting married, without delivering any money at all into the hands of the applicant's prior children." *Id.* (emphasis added).

Similarly, in *Bearden v. Georgia*, the Supreme Court held that the State of Georgia was not entitled to revoke automatically an individual's probation because of the failure to pay the fines and restitution associated with the sentence without some determination that the individual had not made bona fide efforts to pay. *Bearden v. Georgia*, 461 U.S. 660, 662 (1983). The Court rejected the State's claim that "revoking probation further[ed] its interest in ensuring that restitution be paid to the victims of crime" on the grounds that "[r]evoking the probation of someone who through no fault of his own is unable to make restitution will not make restitution suddenly forthcoming." *Id.* at 670; *see id.* ("A rule that imprisonment may befall the probationer *who fails to make sufficient bona fide efforts* to pay restitution may indeed spur probationers to try hard to pay, thereby increasing the number of probationers who make restitution." (emphasis added)). Similarly, the Tennessee statute here is "ludicrously ineffectual" at encouraging the payment of child-support arrears as it makes no accommodation for individuals like the Plaintiffs who simply cannot pay despite a willingness to do so. *Plyler v. Doe*, 457 U.S. 202, 228 (1982) (internal quotation marks omitted).

Moreover,"[t]he Supreme Court, employing rational basis review, has been suspicious of a

legislature's circuitous path to legitimate ends when a direct path is available." *Craigmiles*, 312 F.3d at 227 (citing *City of Cleburne*, 473 U.S. at 449)). And in the instant case, "regardless of the [Plaintiffs'] ability . . . to meet the statutory requirements, the State already has numerous other means for exacting compliance with . . . obligations," such as wage garnishment, which are "means that are at least as effective as the instant statute's and yet do not impinge upon" the Plaintiffs' attempt to regain the right to vote. *Zablocki*, 434 U.S. at 389; *see also id.* at 389–90 ("[C]ourtdetermined support obligations may be enforced directly via wage assignments, civil contempt proceedings, and criminal penalties."). The Supreme Court has made plain that the availability of alternative enforcement mechanisms is relevant in rational-basis review because it exposes the spuriousness of the asserted interest. For example, in *U.S. Department of Agriculture v. Moreno*, 413 U.S. 528 (1973), the Court invalidated as irrational a law that distinguished between related and unrelated individuals for purposes of determining food-stamp eligibility. Although the government asserted that the distinction was intended to deter fraud, which was a legitimate justification, the challenged statute contained other provisions dealing explicitly with fraud prevention. Striking down the statutory provision as a violation of equal protection, the Court stated that the inclusion in the statute of these alternative provisions to deter fraud "necessarily casts considerable doubt upon the proposition that the

[challenged provision] could rationally have been intended to prevent those very same abuses." *Id.* at 537 ("[I]n practical effect, the challenged classification simply does not operate so as rationally to further the prevention of fraud.").

In short, I find entirely unconvincing the majority's conclusion that § 40-29-202(b) and (c) constitute a rational way to encourage Tennessee's legitimate interest in the collection of outstanding financial obligations or encourage compliance with court orders imposing such obligations. The attempt to incentivize payments that an individual is simply incapable of making by linking those payments to the right to vote, particularly when there are other collection methods available, advances no purpose and embodies nothing more than an attempt to exercise unbridled power over a clearly powerless group, which is not a legitimate state interest. *See City of Cleburne*, 473 U.S. at 446–47.

The next proffered justification for the statute—that the ballot box needs "protect[ion]" from those who "continue to break the law by failing to comply with court orders," Maj. Op. at 6—is likewise unconvincing and is belied by the Tennessee statutes governing the non-payment of child support in the case of subsection (c). Pursuant to Tennessee Code § 39-15-101, the mere inability to pay child support is not a crime. *See* Tenn. Code Ann. § 39-15-101(a) ("A person commits the crime of nonsupport . . . [when that person] fails to provide support which that person is *able to provide* and knows the person has a

duty to provide . . . ." (emphasis added)). And the failure to pay when able, absent certain aggravating circumstances, amounts to only a misdemeanor, *id.* § 39-15- 101(a), (e), which is a criminal act that on its own would be an insufficient basis upon which to deny an individual suffrage. *See id.* § 40-20-112 ("Upon conviction for any *felony*, it shall be the judgment of the court that the defendant be infamous and be immediately disqualified from exercising the right of suffrage."); Tenn. Const. art. 1, § 5 (authorizing disenfranchisement for felons "upon a conviction by a jury of some infamous crime"); *cf. Shepard v. Trevino*, 575 F.2d 1110, 1115 (5th Cir. 1978) ("A state properly has an interest in excluding from the franchise persons who have manifested a fundamental antipathy to the criminal laws of the state or of the nation by violating those laws sufficiently important to be classed as felonies."). Moreover, there has been no allegation that any of the Plaintiffs has been convicted of or pleaded guilty to the failure to pay child support such that they have, in fact, been adjudicated of "break[ing] the law," and the statute is certainly not limited to such individuals.

Additionally, the assertion that § 40-29-202(b) and (c) are justified on the grounds the ballot box needs protection from felons such as the Plaintiffs, who are *unable* to make the payments that the statute requires, amounts to nothing "more than a naked assertion that [a felon's] poverty by itself," *Bearden*, 461 U.S. at 671, is a sufficient reason to disqualify the felon

from regaining the right to participate in the exercise of democracy. This, however, cannot be a legitimate justification for § 40-29-202(b) and (c), as the Supreme Court's voting-rights jurisprudence counsels that voting qualifications based on an individual's ability to pay are per se unconstitutional under the Equal Protection Clause. *See Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 666 (1966) (invalidating a Virginia statute that assessed a poll tax in state elections on the grounds "that a State violates the Equal Protection Clause of the Fourteenth Amendment *whenever* it makes the affluence of the voter or payment of any fee an electoral standard." (emphasis added)); *cf. Richardson*, 418 U.S. at 53 ("'Residence requirements, age, previous criminal record are obvious examples indicating factors which a State may take into consideration in determining the qualifications of voters.'" (quoting *Lassiter v. Northhampton County Bd. of Elections*, 360 U.S. 45, 51 (1959) (internal citation omitted)).

The effective result of the State's attempt to justify § 40-29-202(b) and (c) as a legitimate way to limit access to the ballot box is that the State has injected wealth as a determinative factor in an arena where it simply has no place. *See Bynum v. Conn. Comm'n on Forfeited Rights*, 410 F.2d 173, 176–77 (2d Cir. 1969). "Wealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process," and wealth as a measure of a voter's qualification is nothing more than a "capricious or irrelevant factor" that cannot withstand constitutional scrutiny. *Harper*, 383 U.S. at 668;

see also Crawford v. Marion County Election Bd., 553 U.S. 181, __, 128 S. Ct. 1610, 1616 (2008) ("Although the State's justification for the tax [in *Harper*] was rational, it was invidious because it was irrelevant to the voter's qualifications."); *M.L.B. v. S.L.J.*, 519 U.S. 102, 123–24 (1996) ("States are not forced by the Constitution to adjust all tolls to account for disparity in material circumstances. But our cases solidly establish two exceptions to that general rule. The basic right to participate in political processes as voters . . . cannot be limited to those who can pay for a license." (internal quotation marks and citation omitted)).

By providing for the automatic restoration of the franchise to those who have completed their sentences under § 40-29-202(a), Tennessee ceased to rely on the felon's participation in criminal activity as its basis for withholding the right to vote. Instead, the State deemed those felons eligible under subsection (a) of § 40-29-202 just as fit to participate in elections on equal terms as other qualified voters subject to one condition—the payment of a particular financial obligation, regardless of whether the individual can make that payment. Because the Plaintiffs are otherwise eligible for the automatic restoration of the right to vote but are prevented from attaining that right because of their inability to pay a particular sum, the Tennessee statute effectively sets affluence as a voting qualification and is plainly irrational.

In sum, "Tennessee's justifications . . . come close to striking [me] with the force of a five-week-old, unrefrigerated dead fish," which this court has stated is "a level of pungence almost required to invalidate a statute under rational basis review." *Craigmiles*, 312 F.3d at 225 (internal quotation marks and citations omitted). And I simply cannot conjure any rational basis that Tennessee would have for distinguishing between those felons who have outstanding obligations that they are unable to meet and those who do not in determining who is entitled to regain the franchise. No rational purpose underlies this disparate treatment.

2. Supreme Court Jurisprudence Regarding the Propriety of Wealth-Based Distinctions Supports the Conclusion that the Provision is Irrational

In addition to the fact that no proffered or conceivable policy reason can justify § 40-29-202(b)'s and (c)'s restrictions as to the Plaintiffs in the instant case, the Supreme Court's jurisprudence regarding the propriety of wealth-based distinctions further supports my conclusion that the statute differentiates between groups in a manner that is not rationally related to a legitimate interest. Because the statute distinguishes between those who owe a particular obligation and those who do not in determining whether an individual is worthy of the right to vote—regardless of whether an individual is able to pay—it is indisputable that the statute

distinguishes among felons seeking reenfranchisement on the basis of wealth. Although the Supreme Court has declined to deem less-wealthy individuals members of a suspect class, the Court has recognized repeatedly that in some instances wealth-based distinctions or classifications are the result of prejudice rather than reason and cannot be constitutionally countenanced. Such is the case here.

To determine whether the distinction among felons based on their wealth in the instant case is rational and withstands constitutional scrutiny, *Griffin v. Illinois*, 351 U.S. 12 (1956), *Williams v. Illinois*, 399 U.S. 235 (1970), and *James v. Strange*, 407 U.S. 128 (1972), are instructive. In *Griffin*, the Supreme Court invalidated an Illinois law that required defendants who wished to appeal their convictions to purchase a copy of their trial transcripts. The Court determined that although "a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all[,] . . . a State that does grant appellate review [may not] do so in a way that discriminates against some convicted defendants on account of their poverty." *Griffin*, 351 U.S. at 18 (plurality opinion); *see id.* at 21–22 (Frankfurter, concurring). The analogy to the instant case is striking. Even though under current law the Plaintiffs no longer have a fundamental right to vote and Tennessee may deprive felons of the ability to vote indefinitely, when Tennessee decided to authorize reenfranchisement, the state was prohibited from

setting conditions on that reenfranchisement that discriminated against those otherwise-eligible individuals solely on the basis of their ability to pay a particular sum. *Bynum*, 410 F.2d at 176–77; *cf. M.L.B.*, 519 U.S. at 111 (""This Court has never held that the States are required to establish avenues of appellate review, but . . . once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts.'" (quoting *Rinaldi v. Yeager*, 384 U.S. 305, 310 (1966))). The Tennessee statute plainly "discriminates against some convicted [felons] on account of their poverty," *Griffin*, 351 U.S. at 18 (plurality opinion), precluding the reattainment of the franchise solely on the basis of an individual's wealth and thereby contravening *Griffin*.

The Supreme Court's decision in *Williams* likewise indicates that the Tennessee provision cannot withstand even rational-basis scrutiny. In *Williams*, the Supreme Court invalidated a law that required indigent prisoners to serve time beyond their maximum sentences to work off their fines and court costs if the prisoners were unable to pay these financial obligations outright. *Williams*, 399 U.S. at 236, 241. The state contended that it had an "interest in the collection of revenues" and that the "'work off' system" was a "rational means of implementing that policy." *Id.* at 238. Although the Court recognized the State's interest to be "substantial and legitimate," *id.*, it concluded that when an individual's imprisonment exceeded the "maximum period fixed by the statute," and when the additional

term of imprisonment "result[ed] directly from an involuntary nonpayment of a fine or court costs," the statute constituted "an impermissible discrimination that rest[ed] on ability to pay." *Id.* at 240–41. As with voting qualifications, the Court determined that the state had "wide latitude in fixing the punishment for state crimes," *id.* at 241, but "once the State has defined the outer limits of incarceration necessary to satisfy its penological interests and policies, it may not then subject a certain class of convicted defendants to a period of imprisonment beyond the statutory maximum solely by reason of their indigency," *id.* at 241–42.

Again, the analogy to the instant case is striking. Here, Tennessee set the outer limits of its felon-disenfranchisement scheme in § 40-29-202(a) by providing for the automatic restoration of suffrage for those who had completed their terms of imprisonment or received a pardon. Tennessee then proceeded to subject a certain class of felons to an extended period of disenfranchisement beyond that limit solely because of those individuals' failure (and, in the case of the Plaintiffs, inability) to pay a sum of money. This condition leads to the denial of the ability to regain a fundamental right—the right to vote—akin to the right to freedom denied in *Williams*. Thus, while the interest of the State in collecting child support may be "legitimate" or even "substantial," *Williams*, 399 U.S. at 238, it is not rational to achieve that interest in a manner

that discriminates against particular felons on the basis of their wealth.[1]

The conclusion that § 40-29-202(b) and (c) result in a wealth-based distinction that is not rationally related to a legitimate government objective is underscored by *James v. Strange*, 407 U.S. 128 (1972). In *Strange*, the Supreme Court unanimously invalidated under rational-basis review a Kansas recoupment statute that operated to treat indigent defendant debtors differently from other debtors. The statute appeared neutral on its face, but a close examination of the provision made clear that it "strip[ped] from indigent defendants" who were attempting to repay the debt accrued from their appointment of counsel "the array of protective exemptions Kansas had erected for other civil judgment debtors." *Id.* at 135. As in *Williams*, the

[1] The majority's second assertion, that *Griffin* and *Williams* are inapposite because they "concerned fundamental interests subject to heightened scrutiny," Maj. Op. at 8, is also without merit. *Griffin* and *Williams* were, in fact, decided under rational-basis review, and the Court never classified the rights at issue as "fundamental." *See, e.g., Bell v. Hongisto*, 501 F.2d 346, 353 (9th Cir. 1974) ("*Griffin* . . . , although recognizing the importance of adequate review of a criminal conviction, [did] not expressly call it a 'fundamental interest,' nor is it clear a strict standard of review was applied."). More importantly, however, in the years since *Griffin*, as I discuss *infra*, despite cabining the decisions on other grounds, the Supreme Court has never indicated that this line of cases applied anything other than rational-basis review.

Court "recognize[d] that state recoupment statutes may betoken legitimate state interests," but it emphasized that "these interests are not thwarted by requiring more even treatment of indigent criminal defendants with other classes of debtors." *Id.* at 141. And the Court held that the recoupment statute "embodie[d] elements of punitiveness and discrimination[,] which violate[d] the rights of citizens to equal treatment under the law." *Id.* at 142. Here, too, there is no legitimate policy reason for Tennessee to treat felons who have outstanding obligations and are unable to pay any differently from those who owe no financial obligation when it comes to providing for their automatic reenfranchisement.

Moreover, there is no question that the instant case falls within the purview of the above-mentioned Supreme Court precedents addressing the rationality of wealthbased distinctions. The Supreme Court made this plain in *San Antonio Independent School District v. Rodriguez*, when it stated that *Griffin*, *Williams*, and their progeny are controlling when plaintiffs share the following "two distinguishing characteristics": first, "because of their impecunity they [are] completely unable to pay for some desired benefit," and second, "as a consequence [of their impecunity], they sustain[] an absolute deprivation of a meaningful opportunity to enjoy that benefit." *San Antonio Indep. Sch. Dist.*, 411 U.S. at 20. The Plaintiffs in the instant case are unable to pay their financial obligations, which is a prerequisite to obtaining the reinfranchisement benefit that they seek, and given that Tennessee otherwise

provides for the automatic restoration of the right of suffrage upon the satisfaction of these sums, it is as a consequence of their indigency that they suffer an absolute deprivation of their right to vote.[2] *See also id.* at 20–22 (discussing cases where the "class discriminated against" satisfied the two criteria); *M.L.B.*, 519 U.S. at 127 ("Sanctions of the *Williams* genre . . . are wholly contingent on one's ability to pay, and thus visit different consequences on two categories of persons; they apply to all indigents and do not reach anyone outside that class." (internal quotation marks and citation omitted)).

Furthermore, to the extent that the Supreme Court has limited *Griffin* and its progeny to those legislative classifications where the government retains a "legal or a practical monopoly" over the benefit that is the concern of the legislation, *Kadrmas v. Dickinson Pub. Schs.*, 487 U.S. 450, 460 (1988), the instant case falls within that limitation. Like access to the courts, the Plaintiffs have no choice but to engage with the State of Tennessee in seeking the restoration of the right to vote. There is simply "no

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[2] Notwithstanding the fact that Tennessee initially sets a payment schedule in accordance with a parent's financial means when the obligation first attaches, the fact that the financial obligation was attainable at the time that it was fixed says nothing about whether a parent can meet the obligation (and any arrears) at present. The key factor is that the Plaintiffs are now responsible for a sum of money that they cannot pay. The statutory reenfranchisement scheme thus does not accommodate the Plaintiffs' inability to pay.

alternative to that process." *id.*, other than to forgo seeking reenfranchisement altogether. In sum, Tennessee has conditioned the ability of the Plaintiffs to regain their right to vote on their payment of legal financial obligations, notwithstanding the fact that they cannot pay, thereby codifying a wealth-based distinction that has no rational relationship to a legitimate State objective. Under Supreme Court precedent, § 40-29-202(b) and (c) cannot withstand rational-basis review.

3. Supreme Court Disenfranchisement Jurisprudence Supports a Conclusion that § 40-29-202(c) Is Unconstitutional Because It Is Neither Part of the Criminal Sentence for the Felony for Which the State Constitutionally Denied Suffrage Nor Is it Otherwise Related to the Fact of Conviction.

Apart from the reasons set forth above, which are grounded in traditional rational-basis review, I believe it necessary to highlight one additional reason that subsection (c) of § 40-29-202 is constitutionally suspect. Unlike the several felon reinfranchisement cases that courts have confronted across the Circuits, under § 40-29-202(c), Tennessee has decided to impose on those felons seeking reinfranchisement an obligation—the payment of child-support arrears—that is entirely divorced from the reason for which Tennessee was empowered to deny them the

franchise in the first place. Although the Supreme Court has never addressed specifically the bounds of felon reenfranchisement, the Court's cases involving felon disenfranchisement highlight the very limited basis upon which States are empowered to deny absolutely the right of suffrage and counsel against the majority's holding that § 40-29-202(c) is constitutionally sound.

The Supreme Court first upheld the constitutionality of felon-disenfranchisement statutes in *Richardson v. Ramirez*. In that case, the Court determined that an "affirmative sanction" for felon-disenfranchisement existed in § 2 of the Fourteenth Amendment. *Richardson*, 418 U.S. at 54–55, which explicitly linked permissible disenfranchisement to an individual's "'participation in rebellion, or other crime,'" *id.* at 42–43 (quoting U.S. Const. amend. XIV, § 2). Despite holding that a state could constitutionally disenfranchise felons, however, the Court made plain that disenfranchisement laws are not insulated completely from constitutional challenge by remanding the case for the state court to determine whether "a total lack of uniformity in county election officials' enforcement of the challenged [felon disenfranchisement provision] . . . work[ed] a separate denial of equal protection." *Id.* at 56; *see also Owens v. Barnes*, 711 F.2d 25, 26–27 (3d Cir. 1983) ("It has not been seriously contended that *Richardson* precludes any equal protection analysis when the state legislates regarding the voting rights of felons."). In *Hunter v. Underwood*,

the Court further clarified the boundaries of the states' disenfranchisement power, stating again that such laws are not insulated completely from challenge under the Equal Protection Clause. Exemplifying this principle, the Court invalidated a provision in the Alabama State Constitution that disenfranchised individuals who had committed crimes of moral turpitude and that the Legislature had enacted with an intent to discriminate against a suspect class. *Hunter v. Underwood*, 471 U.S. 222, 233 (1985).

Although neither *Richardson* nor *Hunter* addresses the precise question before this panel, both cases emphasize that the ability to disenfranchise stems directly and solely from an individual's commission of a qualifying crime, as contemplated by the plain language of § 2 of the Fourteenth Amendment. They further counsel that laws related to felon suffrage are not immune from constitutional attack and that there are some instances in which such laws will be invalid. Analyzing § 40-29-202(c) in light of *Richardson* and *Hunter*, even assuming it could withstand traditional rational-basis scrutiny, I believe that, in order to withstand a constitutional challenge, the basis upon which the states may condition reenfranchisement for felons must be related to the criminal conviction for which the State was first authorized to abridge suffrage—i.e., the Constitution's explicit "affirmative sanction" for such laws. *See Shepard*, 575 F.2d at 1114 ("Nor can we believe that section 2 would permit a state to make a completely arbitrary distinction between groups of felons

with respect to the right to vote."); *Owens*, 711 F.2d at 27 (expressing sincere doubt that the state could "disenfranchise similarly situated blue-eyed felons but not brown-eyed felons"). The requirement that the Plaintiffs pay child-support arrears prior to the restoration of their right to vote cannot meet this test, as it is a requirement completely divorced from the underlying conviction for which the U.S. Constitution authorized Tennessee to disenfranchise the Plaintiffs.

The suspect nature of this particular provision is reinforced by cases from both federal and state courts that have addressed and upheld the constitutionality of various laws relating to felon disenfranchisement. *See, e.g.*, *Harvey v. Brewer*, 605 F.3d 1067 (9th Cir. 2010); *Hayden v. Paterson*, 594 F.3d 150 (2d Cir. 2010); *Owens*, 711 F.2d at 27–28; *Shepard*, 575 F.2d at 1114; *Madison v. Washington*, 163 P.3d 757 (Wash. 2007). Unlike the child-support-payment provision at issue here, the laws in each of the above-referenced cases involved distinctions or classifications falling into two general, somewhat overlapping, categories that were undeniably related to the predicate conviction: (1) laws requiring that the felon complete the sentence for the disenfranchising felony and (2) laws differentiating between the type of felony committed or the type of sentence imposed for that felony.

In the first category of cases, the laws at issue in both *Harvey* and *Madison* conditioned

reenfranchisement on whether the felon seeking the right to vote had completed the sentence for the disenfranchising felony. In *Harvey*, the law provided that a person convicted of a single felony automatically was entitled to the restoration of the right to vote if the person paid "'any fine or restitution imposed." *Harvey*, 605 F.3d at 1070 (quoting Ariz. Rev. Stat. § 13-912(A)). The Ninth Circuit upheld the restitution-repayment requirement on the grounds that "Arizona has a rational basis for restoring voting rights only to those felons who have completed the terms of their sentences, which includes the payment of any fines or restitution orders." *Id.* at 1079. The panel continued by noting that "[j]ust as States might reasonably conclude that perpetrators of serious crimes should not take part in electing government officials, so too might it rationally conclude that only those who have satisfied their debts to society through fulfilling the terms of a criminal sentence are entitled to restoration of their voting rights."[3] Similarly, in *Madison*, the Washington Supreme Court upheld a statute that required felons seeking the restoration of suffrage to satisfy any outstanding victim restitution, court costs, and fees associated with their disenfranchising felonies. *Madison*, 163 P.3d at 761, 772. The court reasoned that the restitution was part of the felony sentences and that "[t]he State clearly has an interest in ensuring that

[3] Notably, the panel reserved the question of whether "withholding voting rights from those who are truly unable to pay" would satisfy rational-basis scrutiny. *Harvey*, 605 F.3d at 1080.

felons complete all of the terms of their sentence." *Id.* at 772. *Harvey* and *Madison* are thus distinguishable from the instant case with respect to subsection (c) because Tennessee is conditioning the restoration of suffrage on the payment of a sum of money that was neither part of the sentence for the predicate felony nor remotely related to the rehabilitation for the disenfranchising conviction.

The second type of case where courts have upheld felon-disenfranchisement laws that distinguished among felons involves provisions that set reenfranchisement eligibility on the basis of the type of sentence the felon received for the predicate felony or the type of disenfranchising felony that the individual committed. As with the first category of cases, these distinctions also relate to rehabilitation for the underlying offense. For example, in *Hayden v. Paterson*, a panel of the Second Circuit upheld two separate felon-disenfranchisement provisions against an equal-protection challenge. The provisions at issue disenfranchised incarcerated felons and unincarcerated felons "who ha[d] finished their prison terms, but [who were] still on parole" but allowed those felons who received "suspended sentences" to regain the right to vote. *Hayden*, 594 F.3d at 171. Although believing it an "oddity" that the State would distinguish between felons in the manner that it did, the panel nevertheless determined that such distinction was rational. *Id.* After all, the legislature could have believed that the type of sentence imposed for a potentially disenfranchising conviction was a reflection of the

seriousness of the individual's crime and by extension the individual's ability to be a responsible voting citizen. *See id.* ("Where a judge has determined that imprisonment is not necessary it is difficult to perceive any useful purpose to be served by denying a convicted person the right to vote during the period of probation or conditional release." (quoting a letter from the Legal Aid Society)); *see also Owens*, 711 F.2d at 27–28 (upholding a statute that allowed unincarcerated felons to vote but disenfranchised incarcerated felons); *Shepard*, 575 F.2d at 1114–15 (deeming constitutional a provision that reenfranchised felons who were convicted in state court but that required federal felons to obtain a presidential pardon). Again, however, *Hayden*, *Owens*, and *Shepard* are distinguishable from the instant case because, as in *Madison* and *Harvey*, the laws' classifications were related to the predicate felony for which the state was authorized to disenfranchise the felons in the first place, and the laws furthered the states' interests in disenfranchising particular felons as a result of their criminal activity—i.e., the "affirmative sanction" for disenfranchisement found in the Constitution.

By differentiating between those felons who owe a financial obligation completely unrelated to their crime, § 40-29-202(c) is materially distinct from those provisions that courts have held withstand scrutiny. As the Supreme Court emphasized in *Richardson*, the Constitution expressly limits the government's power to disenfranchise to only those individuals

who have committed a crime, and I believe that any law further qualifying a felon's right to vote must be viewed in light of the Constitution's limitation. I thus question whether those classifications that are wholly unrelated to the predicate conviction, such as § 40-29-202(c), can ever be constitutional, even assuming we can develop some reason that they may, in fact, be rational.

4. Conclusion

In conducting a rational-basis inquiry, we "seek only the assurance that the classification at issue bears some fair relationship to a legitimate public purpose." *Plyler*, 457 U.S. at 216. However, "[r]ational basis review, while deferential, is not 'toothless.'" *Peoples Rights Org., Inc. v. City of Columbus*, 152 F.3d 522, 532 (6th Cir. 1998) (quoting *Mathews v. Lucas*, 427 U.S. 495, 510 (1976)). In light of the absence of any rational purpose for the disparate treatment sanctioned by § 40-29-202(b) and (c), as well as the Supreme Court's reluctance to deem rational state-imposed qualifications drawn along economic lines that inhibit the exercise of any right over which the state has a monopoly, I would hold that the provision requiring payment of child support and restitution prior to the restoration of suffrage, regardless of an individual's ability to pay, cannot withstand constitutional scrutiny.

One of the primary reasons that "courts are quite reluctant to overturn governmental action on the ground that it denies equal protection of the laws" is because "[t]he Constitution presumes

that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process." *Vance v. Bradley*, 440 U.S. 93, 97 (1979); *City of Cleburne*, 473 U.S. at 440. The instant case, however, is a perfect example of when this is unlikely to be the case. A "restriction[] upon the right to vote" undeniably "restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation." *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938). Felons are clearly a politically unpopular group, and it is unlikely that anyone else will carry the banner for them. The district court erred in granting judgment on the pleadings with regard to this claim, and I must respectfully dissent from the majority's resolution of the Plaintiffs' Equal Protection Clause challenge.

B. Twenty-Fourth Amendment Claim

Turning to the Plaintiffs' next claim, I would hold that the Plaintiffs have alleged sufficient facts to state a claim for relief under the Twenty-Fourth Amendment to the U.S. Constitution and that judgment on the pleadings was therefore improper. Section 1 of the Twenty-Fourth Amendment provides, in relevant part, that the right to vote in federal elections "shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax." U.S. Const. amend. XXIV. The Amendment was enacted to prevent "the disenfranchisement of the poor," *Harman v. Forssenius*, 380 U.S. 528, 539 (1965), and by its

plain language creates an absolute prohibition on "any poll tax or other tax." U.S. Const. amend. XXIV.

The Twenty-Fourth Amendment is not subject to the same analysis as a statute under the Equal Protection Clause of the Fourteenth Amendment, with its various forms of scrutiny, or the balancing tests set forth in the Supreme Court's voting-rights cases. Instead, if a payment constitutes a "poll tax or other tax," U.S. Const. amend. XXIV, and it denies or abridges the right to vote, then it is unconstitutional. It does not matter whether an individual is capable of paying. *See Harman*, 380 U.S. at 542 ("For federal elections, the poll tax is abolished absolutely as a prerequisite to voting . . . ").[1] A threshold question that the court must face when confronted with the Plaintiffs' Twenty-Fourth Amendment claim, however, is whether the payments at issue here constitute a "tax" within the meaning of the Amendment. Because I believe that the Amendment's prohibition on "other tax[es]" includes portions of the payments potentially required under § 40-29-202(b) and (c), and that the Plaintiffs' right to vote is being abridged or denied by their failure to pay those taxes, I would hold that judgment on the pleadings with respect to this claim was improper.

There is relatively little guidance from the Supreme Court as to the scope of the Twenty-

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[1] See generally Allison R. Hayward, What Is an Unconstitutional "Other Tax" on Voting?

Fourth Amendment apart from its decision in *Harman*,[5] which was the Court's first opportunity to construe the Amendment. *Harman*, 380 U.S. at 529. In *Harman*, the Court addressed the validity of Virginia's newly amended voter-registration law, which, in direct response to the enactment of the Twenty-Fourth Amendment, had "removed the poll tax as an absolute prerequisite to qualification for voting in federal elections, but in its stead [had] substituted a provision whereby the federal voter could qualify either by paying the customary poll tax or by filing a certificate of residence six months before the election." *Id.* at 540. The Supreme Court concluded that "in order to demonstrate the invalidity of" the Virginia provision under the Twenty-Fourth Amendment, "it need only be shown that [the statute] impose[d] a material requirement solely upon those who refuse[d] to surrender their constitutional right to vote in federal elections without paying a poll tax." *Id.* at 541. In other words, the statute was unconstitutional if the requirement that the individual file a certificate of residency imposed a material obstacle upon the voting ability of those "those who assert[ed] their constitutional exemption from the poll tax." *Id.*

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[5] *See generally* Bruce Ackerman & Jennifer Nou, *Canonizing the Civil Rights Revolution: The People and the Poll Tax*, 103 Nw. U. L. Rev. 63 (2009) (highlighting the Supreme Court's lack of discussion and litigants' lack of assertion of the Twenty-Fourth Amendment in several important votingrights cases, including *Harper* and *Crawford*).

After reviewing the certificate-of-residency requirement, the Court held that the filing requirement that the statute "imposed upon the voter who refuse[d] to pay the poll tax constitute[d] an abridgment of [the] right to vote by reason of failure to pay the poll tax" and contravened the Twenty-Fourth Amendment. *Id.* at 542. It is important to note, however, that the Court in *Harman* did not opine on whether the certificate-of-residency requirement itself fell within the Amendment's "other tax" language. Thus, the Supreme Court has not addressed directly the threshold question presently before this panel: Whether the requirement that the Plaintiffs pay restitution and child-support arrears amounts to a "tax" within the meaning of the Twenty-Fourth Amendment's proscriptions.[6]

The majority claims that § 40-29-202(b) and (c) do not invoke the Twenty-Fourth Amendment's protections because they condition voting on payments of obligations that the "Plaintiffs themselves incurred," and "do not represent taxes on voting imposed by the state." Maj. Op. at 12. I believe this reasoning infirm. Certainly, the types of payments at issue here are distinguishable from those in *Harman* and *Harper*. The contested payments in both of those cases were the payments that most commonly come to mind upon hearing the term "poll tax":

[6] As previously mentioned, the Supreme Court also addressed the validity of a "poll tax" in *Harper v. Virginia State Board of Elections*, and ultimately declared the poll tax in state elections unconstitutional under the Equal Protection Clause of the Fourteenth Amendment. *Harper*,

That is, "[a] capitation tax; a tax of a specific sum levied upon each person within the jurisdiction of the taxing power and within a certain class," or "[a] tax upon the privilege of being." Black's Law Dictionary 1159 (6th ed. 1990);[7] *see Harper*, 383 U.S. at 668–69 ("Levy by the poll . . . is an old familiar form of taxation." (internal quotation marks omitted)); *see also Harman*, 380 U.S. at 529 n.1, 530–32 (describing the State of Virginia's poll-tax provisions). The payments at issue here are not capitation or head taxes. But, as mentioned, the plain text of the Twenty-Fourth Amendment does not prohibit only capitation taxes as a voting qualification. The plain

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[7] Conceptually, it is important to remember that the poll tax "originally had nothing to do with voting." Fagan Dickson, *The Poll Tax and Voter Registration*, 35 Tex. L. Rev. 1031, 1031 (1957). It was assessed independently of the exercise of any right. As Professor Hayward, explains:

> The misimpression that a poll tax must be a tax on voting no doubt derives in part from the fact that we refer to voting places as polling places. But "poll" originally was a term referring to the human head. At the polls we count heads and a poll tax is a head tax. See, for example, Ophelia's lament: "His head was as white as snow, / All flaxen was his poll." William Shakespeare, Hamlet, IV, 5.

Hayward, *supra* n.4, at 104 n.5; *see also Harper*, 383 U.S. at 668 n.5 ("Maine has a poll tax which is not made a condition of voting; instead, its payment is a condition of obtaining a motor vehicle license or a motor vehicle operator's license." (internal citations omitted)).

language of the Amendment precludes the imposition of any "other tax," and the *Harman* Court made plain that because the Amendment's drafters intended the Amendment to "nullif[y] sophisticated as well as simple minded modes of impairing the right" to vote, *Harman*, 380 U.S. at 540–41 (internal quotation marks omitted), the absolute prohibition on taxes includes their "equivalent or milder substitute[s]." *Id.* at 542.

1. Portions of the Payments Under § 40-29-202(b) and (c) Are Taxes.

There is a notable absence of case law developing what constitutes an "other tax" such that it falls within the purview of the Twenty-Fourth Amendment. And those cases that do address whether a particular payment amounts to a tax are largely unhelpful because they deal almost exclusively with the costs levied indirectly on the right to vote as a result of voter-identification requirements and fail to analyze the issue under the Twenty-Fourth Amendment's "other tax" language. *See, e.g.*, *Gonzalez v. Arizona*, 485 F.3d 1041, 1049 (9th Cir. 2007) (holding, without much discussion, that Arizona's identification law did not amount to a poll tax under the Twenty-Fourth Amendment); *Ind. Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 826–27 (S.D. Ind. 2006) (rejecting a poll-tax challenge to Indiana's photo-identification law, but curiously failing to cite or explicitly analyze the Twenty-Fourth Amendment), *aff'd sub nom. Crawford v. Marion County Election Bd.*, 472 F.3d 949 (7th Cir. 2007), *aff'd* 128 S. Ct. 1610 (2008);

Common Cause/Ga. v. Billups, 439 F. Supp. 2d 1294, 1354–55 (N.D. Ga. 2006) (holding Georgia's revised photo-identification statute did not constitute a poll tax under the Twenty-Fourth Amendment); *Common Cause/Ga. v. Billups*, 406 F. Supp. 2d 1326, 1366–70 (N.D. Ga. 2005) (finding "a substantial likelihood of success" on the claim that Georgia's photo-identification requirement imposed an unconstitutional poll tax in violation of the Twenty-Fourth Amendment); *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 740 N.W.2d 444, 463–66 (Mich. 2007) (holding that Michigan's identification law did not amount to a poll tax under the Twenty-Fourth Amendment and agreeing with *Rokita*'s reasoning); *cf. Weinschenk v. State*, 203 S.W.3d 201, 213–14 (Mo. 2006) ("While requiring payment to obtain a birth certificate is not a poll tax . . . it is a fee . . . [and] *Harper* makes clear that all fees that impose financial burdens on eligible citizens' right to vote, not merely poll taxes, are impermissible under federal law.").

As the precise question at issue here is one of first impression in this Circuit, I turn first to the Twenty-Fourth Amendment's text. The Supreme Court has emphasized on numerous occasions that in interpreting the text of an Amendment, the courts "are guided by the principle that '[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.'" *District of Columbia v. Heller*, 128 S. Ct. 2783, 2788 (2008) (quoting

United States v. Sprague, 282 U.S. 716, 731 (1931)) (alteration in original). "Normal meaning may of course include an idiomatic meaning, but it excludes secret or technical meanings that would not have been known to ordinary citizens" at the time the Amendment was proposed and ratified. *Id.*

Section 1 of the Amendment reads:

> The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.

U.S. Const. amend. XXIV. In determining what types of "other tax[es]" the drafters had in mind, the common dictionary definitions of the term "tax" are a useful starting point. At the time of the Twenty-Fourth Amendment, "tax" was ordinarily defined as "a usu[ally] pecuniary charge imposed by legislative or other public authority upon persons or property for public purposes: a forced contribution of wealth to meet the public needs of a government." Webster's Third New International Dictionary 2345 (14th ed. 1961 & 15th ed. 1966). Similarly, the legal definition of "tax" at the time of the Amendment's debate and ratification was "[a] forced burden, charge, exaction, imposition, or contribution assessed in accordance with some reasonable rule

of apportionment by authority of a sovereign state upon the persons or property within its jurisdiction to provide public revenue for the support of the government, the administration of the law, or the payment of public expenses." Ballentine's Law Dictionary 1255 (3d ed. 1969); *see* Black's Law Dictionary 28 (4th ed. 1951) ("[A] pecuniary contribution . . . for the support of a government."); *see also United States v. State Tax Comm'n of Miss.*, 421 U.S. 599, 606 (1975) (indicating that the "standard definition of a tax" is an "'enforced contribution to provide for the support of government.'" (quoting *United States v. La Franca*, 282 U.S. 568, 572 (1931)). In essence, a "tax" at the time of the Amendment had the following essential components: (1) that it be levied by the government (2) for the support of the government or the general public.

Contrary to the Plaintiffs' contention, the entirety of the payments at issue here is unlikely to fit the common definition of "tax." Although child-support and restitution orders amount to forced monetary contributions imposed by the State of Tennessee or the U.S. Government, their primary purpose is to benefit dependent children and the victims of the Plaintiffs' criminal actions, as opposed to the public needs of the government. As a result, I believe that as a general matter these payments may be more appropriately viewed as debts. *See* Black's Law Dictionary 1628–29 (4th ed. 1951) (noting in the "Practice" section of the definition of "tax" that a tax, "[i]n a general sense, [is] any contribution imposed by government upon individuals, for the use and

service of the state, whether under the name of toll, tribute, tallage, gabel, impost, duty, custom, excise, subsidy, aid, supply, or other name. And in its essential characteristics is *not a debt*" (emphasis added)); *see also United States v. Reorganized CF&I Fabricators of Utah, Inc.*, 518 U.S. 213, 220, 224 (1996) (distinguishing between a tax and a debt under bankruptcy law); *cf. Jenny Lynn Mining Co. v. Ohio Dep't of Natural Res.*, 780 F.2d 585, 589 (6th Cir. 1986) ("One of the characteristics of a tax as opposed to a fee is that a tax is an exaction for public purposes rather than a voluntary payment for a private benefit.").

But, in fact, I need not decide that broader question here because my inquiry does not end with consideration of the entirety of the payments required under § 40-29-202(b) and (c). Although we may understand child-support and restitution payments as generally being paid for the benefit of a party other than the government, a closer inspection of the obligations at issue here indicates that the government does reap a specific and definable pecuniary benefit from at least some of the obligations required by Tennessee's statute. In the case of child-support arrears, Tennessee law specifically authorizes the State to augment an individual's obligation by five percent, which is payable to the government and is plainly for its benefit. With regard to state and federal restitution orders, there are also instances in which the government is the recipient and intended beneficiary of an individual's payments. Thus, regardless of whether the entirety of the payments required by § 40-29-202(b) and (c) can

be properly defined as taxes in each case where they are imposed, at least some of those required payments can be so classified.

Looking to Tennessee's child-support-payment provisions, pursuant to Tennessee Code § 8-21-403(a), the Tennessee clerk of a court who "receiv[es], handl[es,] and disburs[es] . . . child support . . . under and by order of court is entitled to charge and receive from the obligor the sum of five percent (5%) for any and all payments received during each calendar month." The five-percent addition is not levied separately from the child-support order; instead, it is "an obligation of the obligor and shall be added to the amount of court-ordered child support, making the total obligation of the obligor the support plus the clerk's fee." *Id.* In the event that an individual can afford to pay a portion of his or her child-support arrears and remits that payment to the clerk, the clerk is directed to "prorate any such partial payment as to support and clerk's fee." *Id.* Thus, despite having paid the totality of the original sum owed, an individual would still be precluded from voting as a result of the failure to pay only the state's five-percent levy. In essence, although a child-support obligation in the most general sense may be more properly considered something other than a tax, the five-percent levy added to that obligation, and which by statute becomes part of that obligation, is an enforced

contribution in support of the government—i.e., a "tax."[8]

The restitution that § 40-29-202(b) requires an individual to pay prior to the restoration of suffrage includes both state and federal obligations, so I must look to how each operates to determine whether § 40-29-202(b) imposes an unconstitutional tax. Because there are instances where an individual is obligated to pay restitution to either the state or federal government and that money is allocated to programs for the benefit of the government and the general public, I would hold that § 40-29-202(b) can impose an invalid tax.

First, under Tennessee law, there is at least one circumstance where a defendant is required "to make restitution to the state . . . for deposit into the state general fund." Tenn. Code Ann. § 40-35-320(a), (d). I believe that in such case, the restitution would plainly amount to a

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[8] The fact that a five-percent charge may represent a relatively small amount and would not result in much, if any, increase in state revenue is not dispositive in determining whether these payments amount to the type of "other tax" that the Twenty-Fourth Amendment forbids. If small payments were exempt from the definition, the poll tax itself would pass constitutional muster. The amount of money that remained with the State from a poll tax tied to voting prior to the Twenty-Fourth Amendment's ratification was de minimis, and it provided no substantial revenue. *See* Frederic D. Ogden, *The Poll Tax in the South* 36, 55–58 (1958); *id.* at 55 ("[T]he tax is first a suffrage measure and only incidentally a means of raising revenue."); *id.* at 58 ("Where the poll tax is tied to the suffrage, its purpose is to limit the electorate and not to raise revenue.").

"tax" because under § 40-35-320 a restitution order would amount to a forced contribution of wealth to the State for the general benefit of both the State and the public. *See also* Tenn. Code Ann. § 39-17-417(c)(2)(B) (requiring that certain drug-related sentences include "restitution to any government entity for the costs reasonably incurred in cleaning the area in which [the drug] offense occurred"). Second, in the federal system, restitution orders are generally "governed by the Victim and Witness Protection Act of 1982 ("VWPA")."[12] *United States v. Webb*, 30 F.3d 687, 689 (6th Cir. 1994) (citing 18 U.S.C. §§ 3663, 3664). Although an order of restitution under the VWPA is typically paid to and for the benefit of the victim of the crime, *id.*; *see also* 18 U.S.C. § 3663(a)(1)(A), there is, however, at least one exception relevant to the instant case. Pursuant to § 3663(c), when a defendant has been convicted of a crime under the Controlled Substances Act and when there is "no identifiable victim, the court may order that the defendant make restitution" to the federal government. 18 U.S.C. § 3663(c)(1). The money collected is then distributed to the State within which the crime

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[12] Since the enactment of the VWPA, Congress has enacted a number of additional statutes governing restitution, including the Mandatory Victims Restitution Act of 1996 ("MVRA"), which makes restitution to victims of certain crimes mandatory, *see* 18 U.S.C. § 3663A, and supplements the VWPA. *United States v. Lincoln*, 277 F.3d 1112, 1113 (9th Cir. 2002) ("Congress enacted the MVRA as a supplement to the Victim Witness Protection Act (VWPA), 18 U.S.C. § 3663.").

occurred, with "65 percent of the total amount" being "paid to the State entity designated to administer crime victim assistance," *id.* § 3663(c)(3)(A), and "35 percent of the total amount of restitution" being "paid to the State entity designated to receive Federal substance abuse block grant funds," *id.* § 3663(c)(3)(B).

Restitution awarded under § 3663(c) certainly fits the above-referenced definitions of a "tax." Section 3663(c) imposes a monetary obligation upon an individual, and the statute makes plain that the restitution is collected and then redistributed to fund state-run programming for the general benefit of its citizens. *See also Reorganized CF&I Fabricators*, 518 U.S. at 224 ("[A] tax is a pecuniary burden laid upon individuals or property for the purpose of supporting the Government." (internal quotation marks omitted)); *cf. Wright v. McClain*, 835 F.2d 143, 144, 145 (6th Cir. 1987) (holding that a statute requiring "any person on parole or granted a suspension of sentence in Tennessee" to pay thirty-five dollars per month into funds for the Corrections Department to "defray the cost to the general public of monitoring and supervising the behavior of convicted offenders and to compensate, in some measure, victims of criminal misconduct" imposed a tax). Again, although many restitution orders may not amount to a tax, I need not reach that broader question because some of the restitution orders that § 40-29-202(b)

does encompass do impose a prohibited tax, and the Plaintiffs have stated a viable claim.[10]

2. Section 40-29-202(b) and (c) Operate Analogously to a Poll Tax.

My conclusion that some of the payments required under § 40-29-202(b) and (c) amount to a prohibited tax is not altered by the fact that these payments may also meet the broader definition of a debt because my analysis of whether § 40-29-202(b) and (c) require payment of a "tax" as a prerequisite to voting does not stop with definitions. Instead, a comparison of the poll tax at issue in *Harman* to the payments required here also helps to clarify the parameters of the definition of tax and provides further support for my conclusion that the Twenty-Fourth Amendment encompasses at least a portion of the payments required by § 40-29-202(b) and (c).

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[10] Because the district court dismissed the case on the pleadings, the record on appeal contains little information on the Plaintiffs' obligations in either the state or federal system. As indicated above, however, the substance of these orders is important to resolving the instant case. According to a document from the U.S. Department of Justice submitted by the Plaintiffs—of which I take judicial notice—at least one of the Plaintiffs' restitution orders "may include additional costs, interest, penalties, and a surcharge" in addition to the amount the Plaintiff initially owed. Pl. Exh. A at 11. If this is the case, then the Plaintiffs' argument that portions of the restitution orders amount to a prohibited "tax" is even stronger.

Tellingly, at the most fundamental level, § 40-29-202(b) and (c) operate in the same manner as the indisputably forbidden "poll tax"—they both require an individual who desires to vote to pay a monetized sum as an absolute condition to casting a ballot in a federal election. This similarity is extremely relevant given that "[o]ne of the basic objections to the poll tax was that it exacted a price for the privilege of exercising the franchise" and that the primary motivation of the Amendment was "a general repugnance to the disenfranchisement of the poor occasioned by failure to pay the tax." *Harman*, 380 U.S. at 539; *see also Harper*, 383 U.S. at 668. The fact that § 40-29-202(b) and (c) set the price for the privilege of voting at something besides a government-imposed per capita levy is not determinative. The statute sets a price nonetheless, and this is the exact evil that the Twenty-Fourth Amendment was meant to address.

The majority implies that the Twenty-Fourth Amendment prohibits only those payments that the State imposed with a specific purpose to inhibit exercise of the franchise and those payments that a person would not otherwise be required to make. The specific poll tax at issue in *Harman*, however, counsels the opposite conclusion, and provides another point of comparison between the clearly unconstitutional "poll tax" and the payments in the instant case. This again supports the conclusion that, at the very least, parts of the payments required under the Tennessee statute are properly considered

taxes. In Virginia, the failure to pay the poll tax not only precluded the exercise of suffrage, but it also amounted to a separately enforceable financial obligation or debt similar to an order for restitution or an order for the payment of child-support arrears. *See Harper*, 383 U.S. at 664 n.1; Frederic D. Ogden, *The Poll Tax in the South* 64 (1958) ("In Virginia, collection of the poll tax is enforceable . . . [once] the tax has become three years past due." (citing Va. Const. § 22)). Moreover, an individual could not avoid payment of the poll tax by not voting. "Property owners [we]re assessed for the poll tax along with assessment of their property," and "[s]ome county officials ma[d]e an effort to assess all who [we]re liable," leading to instances where "citizens pa[id] the poll tax as an item of the general tax bill without realizing that they ha[d] done so." *Id.* at 65–66. In other words, it is not true that those taxes the Twenty-Fourth Amendment prohibits can be narrowly defined to include only otherwise avoidable payments that remain uncollected except as a prerequisite to the exercise of suffrage. As the Plaintiffs in the instant case "themselves incurred" their obligations apart from their attempt to vote, Maj. Op. at 12, so did the potential federal voters in Virginia. At the time of the Twenty- Fourth Amendment, poll-tax obligations were levied by the various governments, amounted to enforceable debts, and were frequently paid regardless of whether an individual ever attempted to vote.

The poll taxes that existed in several other states at the time of the Twenty-Fourth

Amendment also support the conclusion that what amounts to a prohibited "other tax" is not restricted to only those monetary obligations that are tied exclusively to the right to vote and not otherwise owed as debts or similar financial obligations. In Arkansas, payment of the poll tax was not simply a prerequisite to voting but was required to obtain "a state or municipal license or permit of any kind and to receive any salary or other compensation from public funds." Ogden, *Poll Tax*, *supra* at 61. "In Mississippi payment [wa]s voluntary and no bills [we]re sent out," but the State did "make the tax a lien upon taxable property." *Id.* at 63. "[P]oll tax delinquents [in Texas were] subject to three additional days of road work over the five days normally required or to the payment of a fine of $3.00," and the State "levi[ed] penalties upon [a] late poll tax payment," in the same manner "as for other delinquent taxes." *Id.* at 68. In 1948 in South Carolina, "poll tax collections were prosecuted like those for other taxes." *Id.* at 72.

Even Tennessee's poll tax, although abolished prior to the Amendment's ratification, "had fairly stringent provisions relative to its payment," *id.*, and amounted to a financial obligation regardless of and independent from the desire or attempt to exercise franchise. As reflected in the Tennessee Code from 1934, the payment of the poll tax was tied to the payment of property taxes, the state levied penalties for delinquency, and delinquent taxpayers were at risk of "the sale of his personal property and to garnishment proceedings." *Id.*; *see* Williams Tenn.

Code §§ 1559, 1547, 1574, 1577 (1934). Again, analogous to the payments that the Plaintiffs in the instant case face, poll-tax assessments were individually incurred, independently collectable financial obligations that were owed regardless of one's actual attempt to exercise the right of suffrage. Thus, although the child-support arrears and restitution payments outlined above could also be classified as debts, so too could those poll taxes in existence at the time of the Twenty-Fourth Amendment's ratification.

In sum, the text of the Amendment as well as the similarities between the quintessential "poll tax" at issue in *Harman* and the payments challenged here lead me to conclude that portions of the financial preconditions to voting that the Plaintiffs now face amount to a tax on voting of the kind that the Twenty-Fourth Amendment prohibits.

3. The Legislative History of the Twenty-Fourth Amendment Indicates that Congress Intended to Preclude the Payment of Money Generally.

The legislative history of the Twenty-Fourth Amendment further supports my conclusion that at least a portion of the child-support and restitution orders under § 40- 29-202(b) and (c) falls within the drafters' conception of the Amendment's prohibition. The Senate did not issue a Committee Report for the Amendment until after it was approved. *See* S. Rep. No. 87-

305, at 11–13 (1962). The contemporaneous House of Representatives Committee Report, however, does recognize that the Amendment's text extended beyond poll taxes and "would also prevent both the United States and any State from setting up any substitute tax in lieu of a poll tax." *See* Proposed Constitutional Amendment: Poll Tax as a Qualification for Voting, H.R. Rep. No. 87-1821 (1962), *reprinted in* 1962 U.S.C.C.A.N 4033 (1962). The House Report stopped short of delineating what types of taxes qualified as these "substitute tax[es]," but the Report indicated that the Amendment would "prevent[] the nullification of the amendment's effect by a resort to subterfuge." *Id.* at 4037. The types of payments that fall within the definition of "tax" must therefore be determined with this legislative purpose in mind. Certainly the requirement that an individual pay the above-described sums as a prerequisite to voting thwarts the stated purpose of the Amendment to eliminate pecuniary "obstacle[s] to the proper exericse [sic] of a citizen's franchise." *Id.* at 4035.

The Senate and House debates, as well as the House hearings on the elimination of the poll tax, further indicate that Congress envisioned that the Amendment's prohibition on the use of an "other tax" would encompass the payments of money generally and would certainly reach those portions of child-support and restitution orders payable to the government and for its benefit, if not the obligations in their entirety. For example, during the Hearings before the House Committee on the Judiciary, Representative Gonzalez

indicated that "[t]here should not be any price tag or any other kind of tag on the right to vote." *Abolition of Poll Tax in Federal Elections: Hearing on H.J. Res. 404, 425, 434, 594, 601, 632, 655, 663, 670 & S.J. Res. 29 Before the Subcomm. No. 5 of the H. Comm. on the Judiciary*, 87th Cong., 2d Sess. 15 (1962). And alluding to the manner in which I have analyzed the Tennessee provisions above, Representative Gonzalez counseled that "tax" should be defined "within the framework of the history and the payment of the poll tax or similar taxes." *Id.* at 17. The Hearings also addressed the "other tax" language directly, noting that it was fairly broad and would prevent the government from levying "say, a property tax, a real estate, ad valorem[] tax[,] . . . [or] a property tax on automobiles." *Id.* at 51.

The Senate debates did not address at any length the potential scope of the Amendment's "other tax" language or what might amount to a forbidden poll-tax substitute. Senator Javits, however, spoke of eliminating any "encumbrance" on the right to vote of the poll tax's "character." 108 Cong. Rec. at 4155. As outlined above, at least some of the payments required under § 40-29-202(b) and (c) share fundamental characteristics with the poll tax. Again, they are forced monetary contributions paid to the government for the benefit of the government or the general public, regardless of the fact that may also amount to independently collectable debts.

The statements made during the House debates are a bit more helpful in defining those

payments that the Amendment was intended to reach, and they demonstrate that it was not only those payments that fit within the technical definition of a tax that the Amendment targeted. Representative Fascell, explaining his support for the Amendment, made clear that "the *payment of money* whether directly or indirectly, whether in a small amount or in a large amount should never be permitted to reign as a criterion of democracy." 108 Cong. Rec. at 17657 (emphasis added). "There should not be allowed a scintilla of this in our free society." *Id.* Representative Joelson also spoke in support of the Amendment, declaring it "unthinkable that in the United States, there are still areas in which American citizens are required to pay for the right to vote." *Id.* at 17662. Representative Boland stated that "there should not be any *price tag or any kind of tax* on the right to vote." *Id.* at 17666 (emphasis added). "For some people, this financial imposition may be enough to discourage participation in the electoral process." *Id.* Representative Yates exclaimed that, "[p]lacing the *payment of a fee* between the voter and the ballot box is distinctly not in keeping with the ideals of our democracy." *Id.* (emphasis added). Representative Gallagher stated, "*Any charge* for voting unjustly discriminates against people of limited means." *Id.* at 17667 (emphasis added). "And whatever the amount of money, a citizen of the United States should not have to pay for his constitutional right to vote." *Id.* Representative Curtis highlighted the "important right to cast a free ballot." *Id.* at 17668. And, finally, Representative Halpern advocated for the

Amendment's passage as a step toward "outlawing th[e] undemocratic, feudal practice of placing a *price tag* on the right to vote." *Id.* at 17661 (emphasis added).

The drafters and supporters of the Twenty-Fourth Amendment plainly intended that the Amendment reach those payments of money that placed a price on the franchise, regardless of whether those taxes could also be characterized as debts or fees. *See Harman*, 330 U.S. at 542. Reading "tax" too restrictively would undoubtedly conflict with this overarching intent. In fact, albeit in the context of striking down the poll tax as unconstitutional in state elections under the Fourteenth Amendment, the *Harper* Court used the term "tax" interchangeably with "fee" in discussing the primary evil of the poll tax. *See Harper*, 383 U.S. at 668 ("The principle that denies the State the right to dilute a citizen's vote on account of his economic status or other such factors by analogy bars a system which excludes those unable to pay a *fee* to vote or who fail to pay." (emphasis added)). This evidences the broader common understanding of what amounted to a tax on voting only a few short years after the Amendment's ratification, and, by extension, what meaning "other tax" may have had. It also emphasizes that the primary objection to the poll tax was the imposition of *any* pecuniary obstacle on an individual's right to vote.

In sum, a plain reading of the Twenty-Fourth Amendment's text, an analysis of the

types of payments against which the drafters of the Amendment intended to guard based on the common understanding of the operation and characteristics of a "poll tax," and the legislative history of the Amendment leave me without a doubt that at least portions of Tennessee's required payments fall within the scope of the Amendment and constitute a prohibited "other tax." It is worth emphasizing again that the Amendment was enacted with the purpose of thwarting "sophisticated as well as simple minded" attempts to disenfranchise the poor. *Harman*, 380 U.S. at 540. And although the payments here may be reasonably justified outside of the election context, they are completely without a function in the State's administration of federal elections.

4. Section § 40-29-202(b) and (c) Abridge the Right to Vote.

Having concluded that at least portions of the payments required under § 40-29- 202(b) and (c) amount to the type of "tax" that the Twenty-Fourth Amendment prohibits, I turn to whether those taxes deny or abridge the right to vote. *See* U.S. Const. amend. XXIV. They plainly do. Although it was the disenfranchisement statute that first denied the Plaintiffs the right to vote following their felony convictions, the Plaintiffs would be eligible automatically for the restoration of suffrage *but for* the pecuniary preconditions in § 40-29-202(b) and (c). In short, the only reason that the State is able to continue to deny the Plaintiffs the right to vote is because they are

unable to pay what § 40-29- 202(b) and (c) require. The Plaintiffs' right to vote in federal elections is impaired "by reason of failure to pay the . . . tax," *Harman*, 380 U.S. at 544, and for no other reason.[11] The district court erred in granting judgment on the pleadings on the Plaintiffs' claim under the Twenty-Fourth Amendment.

C. Tennessee State-Law Ex Post Facto Claim

With regard to the Plaintiffs' state-law ex post facto claim, I also depart from the majority's conclusion, and I would hold that § 40-29-202(b) and (c) are punitive in nature and that their

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[11] The majority's statement that the Twenty-Fourth Amendment is inapplicable because Tennessee's "provisions do not *dis*enfranchise" the Plaintiffs "or anyone else," Maj. Op. at 11 (emphasis added), fails to recognize that although an explicit disenfranchisement provision is the most extreme example of a provision that denies or abridges the right to vote, it is not the only one. It bears repeating that *but for* these taxes, the Plaintiffs would be otherwise entitled to cast their ballots. This is nothing more than elemental causation—it is the taxes that are denying the Plaintiffs the right to regain the franchise.

The Supreme Court and Congress have emphasized repeatedly that economic status has no bearing on an individual's ability and right to participate in the electoral process and plays no role. *See, e.g.*, *Harman*, 380 U.S. at 539; *Harper*, 383 U.S. at 666. Despite this declaration, however, under the majority's reasoning, the State would be authorized to enact a provision within Tennessee's reinfranchisement statute that explicitly required all felons to pay $1000 before casting their vote with no constitutional limitation at all. This cannot be the law.

retroactive application contravenes the Constitution of the State of Tennessee.[12]

Article I, Section 11 of the Tennessee Constitution prohibits the creation of ex post facto laws. Tenn. Const. art. 1, § 11. "[T]he application of the Ex Post Facto Clause is a legal question subject to de novo review." *Doe v. Bredesen*, 507 F.3d 998, 1002 (6th Cir. 2007) (considering the U.S. Constitution). We also review de novo a district court's interpretation of a state constitution. *Id.* at 1003. Tennessee courts generally look to interpretations of the federal provision for guidance when analyzing state-based ex post facto claims. *Id.* at 1008. The Tennessee Supreme Court has indicated, however, that the state clause is interpreted more broadly than the federal one and provides stronger protection. *See Miller v. State*, 584 S.W.2d 758, 760–61 (Tenn. 1979) (rejecting a federal Supreme Court ex post facto holding as too restrictive under the state constitution); *see*

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[12] I disagree with the majority's conclusion that the Plaintiffs have appealed "only the rejection of their Tennessee constitutional claim." Maj. Op. at 13. Although not a model of clarity, the Plaintiffs' appellate brief explains in several places that they believe the enforcement of the challenged statute violates both the state and federal ex post facto clauses. Pls.' Br. at 3, 41, and they cite the U.S. Constitution and U.S. Supreme Court case law, in addition to state law, in support of their arguments. *See id.* at 39–47. Regardless of whether the federal claim was waived, however, I would decline to reach the merits because the Plaintiffs prevail under state law.

also Decker v. Carroll Acad., No. 02A01-9709-CV-00242, 1999 WL 332705, *12 (Tenn. Ct. App. May 26, 1999) (unpublished) (noting that with regard to the ex post facto clause, "[t]he Tennessee Constitution can provide stronger protection than that provided by the United States Constitution," and citing *State v. Middlebrooks*, 840 S.W.2d 317, 338 (Tenn. 1992), among other cases).

"The [federal] Ex Post Facto Clause is implicated where a law punishes retrospectively: a law is retrospective if it changes the legal consequences of acts committed before its effective date." *Doe*, 507 F.3d at 1003 (internal quotation marks omitted). A claim under the federal Ex Post Facto Clause generally invokes a two-part inquiry. First, we determine the nature of the challenged law, evaluating whether it is civil, regulatory, or punitive. *See Smith v. Doe*, 538 U.S. 84, 92 (2003). If the legislature intended to impose a punishment and the law applies retroactively, however, then "that ends the inquiry." *Id.* "If, however, the intention was to enact a regulatory scheme that is civil and nonpunitive, we must further examine whether the statutory scheme is so punitive either in purpose or effect as to negate the State's intention to deem it civil." *Id.* (internal quotation marks and alteration omitted). In conducting this examination, we consider the seven factors outlined in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168–69 (1963). *Smith*, 538 U.S. at 97.

Thus, the first and potentially dispositive question in the instant case is whether the

provisions requiring the payment of child-support arrears and restitution as preconditions to the restoration of a felon's right to suffrage are punitive. In making this determination, the task is one of statutory construction, *id.* at 92, which begins with legislature's declared objective, *id.* at 93, and proceeds to "[o]ther formal attributes of a legislative enactment, such as the manner of [the law's] codification or the enforcement procedures it establishes," *id.* at 94. The express declarations of the Tennessee state courts as to the statute's purpose are also important because "state courts are the ultimate expositors of state law." *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975).

1. Section 40-29-202(b) and (c) Are Punitive in Nature.

Conducting the proper inquiry, I would hold that the challenged provisions are punitive. The legislative bill adding payment of restitution and child support as preconditions to the restoration of suffrage contains no express evidence regarding the Legislature's intent. *See Doe*, 507 F.3d at 1003–04 ("We first ask whether the Tennessee Legislature, in passing the [provisions] 'indicated either expressly or impliedly a preference for one label or the other,' i.e., civil or criminal." (quoting *Smith*, 538 U.S. at 93)). There is also no legislative statement of reasons or committee report indicating whether the Legislature as a whole enacted § 49-29-202(b) and (c) with a civil or punitive intent. The positioning of the challenged provisions within the "Criminal Procedure" Title of the Tennessee

Code, however, does tend to indicate that the provisions are punitive. *Cf. Kansas v. Hendricks*, 521 U.S. 346, 361 (1997) ("[The State's] objective to create a civil proceeding is evidenced by its placement of the Act within the [State's] probate code, instead of the criminal code."); *Simmons v. Galvin*, 575 F.3d 24, 43–44 (1st Cir. 2009) ("In examining Article 120[, a disenfranchisement provision,] on its face, there is no language indicating the . . . provision is penal. Article 120 is not in the . . . criminal code, but rather [in the] civil constitutional and statutory voter qualification provisions." (internal quotation marks omitted)). Although placement is not always dispositive, the provisions' appearance within the "Criminal Procedure" Title is particularly revealing in the instant case given the fact that the general provision governing the "[r]estoration of suffrage to persons convicted of infamous crimes"—i.e., the provision authorizing a felon-voter restoration scheme—is located in the Tennessee Code Title "Elections." Tenn. Code Ann. § 2-2-139. If the Legislature had merely regulatory intentions in enacting § 40-29-202(b) and (c), it could have included provisions with the other reinfranchisement provisions in the "Elections" Title as well.

Perhaps the greatest indicator of the punitive intent of § 40-29-202(b) and (c), however, is the Tennessee Supreme Court's statements regarding the State's statutory provision that first disenfranchised felons, § 2-19-143. In striking down the retroactive application of that provision, the Tennessee Supreme Court concluded

explicitly that "[l]aws disenfranchising convicted felons are penal." *May v. Carlton*, 245 S.W.3d 340, 349 (Tenn. 2008). Because the statutory provisions governing conditions of reinfranchisement in the instant case are simply provisions governing the period of disenfranchisement, I believe that the Tennessee Supreme Court, in light of *May*, would view any law that works to restrict further a felon's right to vote by, for example, conditioning that right on the payment of money, as equally punitive. *Cf. Gaskin v. Collins*, 661 S.W.2d 865, 868 (Tenn. 1983) (rejecting as unconstitutional the "injustice of retroactive disenfranchisement").

The majority appears to believe that the Tennessee courts would find the statutory provisions civil or regulatory because *May*'s statement that disenfranchisement laws are "penal" cannot be separated from the particular question at issue in that case—whether the retroactive expansion of the crimes that qualify as "infamous" and thus permit disenfranchisement violated the ex post facto prohibition. But in concluding that § 40-29-202(b) and (c) fall outside of *May*'s scope, the majority again fails consider the statute's operation and takes an unduly restrictive view of *May*. In practice, § 40-29-202(b) and (c) achieve the exact same end as the Legislature's retroactive classification of additional crimes as "infamous" in *May*, albeit via different means. As compared to the pre-2006 version of the law, the challenged provisions make it more difficult to have the right of suffrage restored. In concluding otherwise, the majority

fails to acknowledge that § 40-29-202(b) and (c) prolong the period of clearly penal disenfranchisement. *See infra* Part I.C.2.

Under the present statutory scheme, as compared to the law that was in effect when the Plaintiffs were convicted, sentenced, and disenfranchised, the State denies the Plaintiffs the right to vote solely because of their inability to pay outright their outstanding restitution or child support. Because the Plaintiffs would have been otherwise entitled to vote automatically prior to the 2006 amendments, the statute in the instant case in its operation essentially expands the list of acts for which the State is authorized to disenfranchise. What is perhaps even more troubling about these provisions when compared to those that the court faced in *May*, however, is that the State is achieving covertly that which it could not accomplish outright even on a prospective basis. Tennessee is not authorized to deny the right to vote for mere failure to pay an obligation, as that act is not an "infamous" crime, and the State is certainly not authorized to do so in instances where the individual has yet to be convicted of any act related to the alleged nonpayment.[16] Yet, this is the practical effect of § 40-29-202(b) and (c).

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[16] The majority also believes the fact that restitution and child-support obligations exist to serve a civil and social purpose, as opposed to a penal one, is somehow dispositive. That observation misses the mark. It is not the requirement that the Plaintiffs ultimately make these payments that I find unconstitutional. Rather, it is the State's decision to

In sum, I disagree with the majority's conclusion that § 40-29-202(b) and (c) are not punitive in intent. The Legislature's placement of the provisions within the "Criminal Procedure" Title of the Tennessee Code, coupled with the fact that the provisions prolong penal disenfranchisement, lead me to conclude that the Tennessee legislature enacted these provisions with a punitive intent.

2. Section 40-29-202(b) and (c) Are Retrospective and Disadvantage the Plaintiffs' Rights.

Because I would conclude that § 40-29-202(b) and (c) are punitive for purposes of the state ex post facto analysis, I next turn to whether the law is "retrospective" and whether it works to "disadvantage the offender affected by it." *State v. Pike*, 978 S.W.2d 904, 925 (Tenn. 1998) (internal quotation marks omitted); *id.* at 926 (indicating that only laws that affect substantive rights may disadvantage the offender). Here, § 40-29-202(b) and (c) are retrospective in that they apply "to events occurring before its enactment." *Pike*, 978 S.W.2d at 925 (internal quotation marks omitted). The Plaintiffs were tried, convicted, sentenced, and disenfranchised prior to 2006, which was the year that the Legislature enacted the challenged provisions. The law works to disadvantage the Plaintiffs' substantive rights by imposing upon

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condition the Plaintiffs' ability to regain the right to suffrage on those payments that is punitive in intent.

them a greater punishment—a lengthened period of disenfranchisement—than they would have received prior to 2006. More specifically, § 40-29-202(b) and (c) preclude the Plaintiffs from regaining their fundamental right of suffrage upon mere completion of their sentence, as they would have been entitled to do under the pre-2006 framework. Instead, the provisions require the payment of monetary obligations that the Plaintiffs cannot make. As I have emphasized repeatedly, were it not for the provisions, the Plaintiffs would now be able to vote.

The majority disagrees with this conclusion. It posits that the Plaintiffs' punishment did not change after the 2006 amendments and that § 40-29-202(b) and (c) do not amount to punishment. Again, however, this conclusion fails to recognize that § 40-29-202(b) and (c), in fact, increase the *length* of the Plaintiffs' punishment. It also fails to recognize that retroactive changes to the *length* of a particular punishment implicate Tennessee's ex post facto prohibition regardless of whether the *type* of punishment remains constant. *See State v. Pearson*, 858 S.W.2d 879, 883 (Tenn. 1993) (indicating that the proper inquiry is "whether the law changes the punishment to the defendant's disadvantage, or inflicts a greater punishment than the law allowed when the offense occurred"). No one contests that prior to the 2006 amendments, the Plaintiffs would have regained suffrage upon completion of their imprisonment, parole, and probation. Now they are disenfranchised (i.e., punished) for a longer

period of time; i.e., until they are able (if ever) to pay their outstanding obligations. It is indisputable that this potential for an extended period of punishment was nonexistent when the Plaintiffs were first disenfranchised.

Considering the majority's belief that a change in the length of punishment is constitutionally irrelevant in the context of a different type of punishment, such as imprisonment, the logical flaw becomes apparent. For example, under the Ex Post Facto Clause of the U.S. Constitution, which provides less protection than the state constitution, Tennessee courts have held that the State is prohibited from enacting a law that provides a prisoner with prison-release credits for good behavior (which, like reenfranchisement, the State is not required to do) and then via subsequent legislation enacting a law that retroactively reduces the number of credits the prisoner could earn (in other words, impose upon the prisoner a provision that makes it harder to gain early release). *See Allen v. Campbell*, No. M2001-00277-COA-R3-CV, 2002 WL 373246, at *4 (Tenn. Ct. App. Mar. 11, 2002) ("Sentence reduction credit statutes in effect at the time of the commission of a crime are . . . an inherent part of [a prisoner's] sentence; consequently, application to him of a system of sentence credits which reduces the amount of credit he is eligible to receive, if such application effectively imposes a greater punishment at a date after the offense, is subject to constitutional attack [under the Ex Post Facto Clause of the U.S. Constitution]."); *see also Garrett v. Little*, No.

M2008-01867-COA-R3-CV, 2009 WL 2432974, at *7 (Tenn. Ct. App. Aug. 7, 2009) (same). But under the majority's reasoning, the State would be able to do so. After all, the new law governing early-release credits would affect only the availability of early release; the punishment itself—imprisonment—would remain constant. *Allen* and *Garrett* make plain that this is not the law in Tennessee. Disenfranchisement is a mandatory part of a felon's sentence under § 40-20-112, and Tennessee case law indicates that we must treat § 40-29-202(b) and (c) as imposing a greater punishment by extending the length of disenfranchisement—a recognized punitive measure—and making more difficult the Plaintiffs' ability to regain their right to vote.

Finally, my conclusion that the provisions are unconstitutional is only bolstered by the Tennessee Supreme Court's emphasis that the state ex post facto clause is interpreted more broadly than its federal counterpart and that disenfranchisement laws are punitive in nature. In its analysis, the majority fails to acknowledge this fact or the fact that felon disenfranchisement and the ex post facto clause constitute an area of law where the Tennessee Supreme Court plainly has broken ranks with the federal Constitution on previous occasions, *compare May*, 245 S.W.3d at 349, *with Trop v. Dulles*, 356 U.S. 86, 96–97 (1958).

I believe that the Tennessee Supreme Court would deem subsections (b) and (c) of § 40-29-202 to be punitive in nature and that, when

retroactively applied, they violate the Tennessee State Constitution's prohibition on ex post facto laws. I would hold likewise and believe that the district court erred in concluding to the contrary.

II.

For the reasons stated above, I believe the district court erred in dismissing the claims on the pleadings, and I therefore respectfully dissent.

No. 08-6377

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

TERRENCE JOHNSON, ET AL., Plaintiffs-Appellants,	)	
v.	)	ORDER
PHIL BREDESEN, GOVERNOR OF THE STATE OF TENNESSEE, ET AL., Defendants-Appellees.	)	

BEFORE: MOORE and COOK, Circuit Judges; LUDINGTON[1], District Judge.

The court having received a petition for rehearing en banc, which was circulated to all active judges of this court, none of whom requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied. Judge Moore would grant rehearing for the reasons stated in her dissent.

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[1] Hon. Thomas L. Ludington, United States District Judge for the Eastern District of Michigan, sitting by designation.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

TERRENCE JOHNSON, JIM HARRIS,ALEXANDER FRIEDMANN, and JOSHUA ROBERTS,	)	
Plaintiffs,	)	Case No. 3:08cv0187
v.	)	
PHIL BREDESEN, Governor of the State of Tennessee, BROOK THOMPSON, Coordinator of Elections, RILEY DARNELL, Secretary of State of Tennessee, JAMES JOHNSON, Administrator of Elections for Shelby County, KIM BUCKLEY, Administrator of Elections for Madison County, and RAY BARRETT, Administrator of Elections for Davidson County, in their official capacities,	)	Judge Thomas A. Wiseman, Jr.
Defendants.	)	

MEMORANDUM OPINION

Before the Court are (1) a Motion for Judgment on the Pleadings as to the Constitutional Challenges Contained in the Amended Complaint (Doc. No. 58) filed by defendants Phil Bredesen, Brook Thompson and Riley Darnell (collectively, the "State Officials"), and (2) Plaintiffs' Motion for Judgment on the Pleadings or in the Alternative Motion for Partial Summary Judgment (Doc. No. 68). The motions have been fully briefed and the parties presented oral argument on their motions at a hearing conducted on September 15, 2008.

For the reasons set forth below the Court finds that the State Officials' motion is meritorious and that they are entitled to judgment in their favor as a matter of law as to Counts One through Five of the Amended Complaint. Those Counts will be dismissed, leaving for adjudication only plaintiff Alexander Friedmann's due-process claims under the United States and Tennessee Constitutions, set forth in Count Six of the Amended Complaint. Plaintiffs' motion for judgment will be denied.

I. INTRODUCTION

After this Court issued its Memorandum Opinion and Order (Doc. Nos. 44 and 45) denying the County Official defendants' motions to dismiss, plaintiffs filed an Amended Complaint (Doc. No. 57) in which they joined a new plaintiff, Joshua Roberts. In the Amended Complaint as in the original Complaint, Plaintiffs seek to invalidate those portions of Tenn. Code Ann. § 40-29-202 that condition the restoration of voting rights for people

previously convicted of a felony upon their payment of certain legal financial obligations, namely restitution and child support. Plaintiffs assert that this statute, by denying the vote to those who have not satisfied certain legal financial obligations, violates their fundamental right to vote and discriminates among citizens on the basis of wealth. More specifically, Plaintiffs claim that the statutory provisions at issue violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution (Counts One and Two), the Twenty-Fourth Amendment to the United States Constitution ("Count Three"), the Ex Post-Facto Clauses of the United States and Tennessee Constitutions ("Count Four"), and the Privileges and Immunities Clauses of the United States and Tennessee Constitutions ("Count Five"). Count Six of the Amended Complaint asserts that the State of Tennessee has refused to restore plaintiff Alexander Friedmann's voting rights despite the State's failure to produce any documentation showing Mr. Friedmann owes outstanding restitution, in violation of the Due Process Clauses of the United States and Tennessee Constitutions. Plaintiffs name as defendants those state and county officials, in their official capacity, they allege are responsible for the implementation and enforcement of the state statutory scheme as it pertains to voter eligibility and registration. They seek declaratory and injunctive relief, nominal damages, attorney's fees and costs.

The State Officials have now filed their motion for judgment on the pleadings under Rule 12(c) of the Federal Rules of Civil Procedure, asserting that,

even assuming the Plaintiffs' factual allegations are true, they are not entitled to any relief on Counts One through Five of the Amended Complaint.[1] Plaintiffs oppose the State Officials' motion, but they have also filed their own motion for judgment on the pleadings and alternative motion for partial summary judgment as to Counts One through Five.

II. FACTUAL BACKGROUND

The facts are undisputed for purposes of the parties' motions. Under current Tennessee law, a citizen convicted of a felony and thereby deprived of the right to vote can apply for a voter registration card and seek to regain the right of suffrage upon:

> (1) Receiving a pardon, except where the pardon contains special conditions pertaining to the right of suffrage;
>
> (2) The discharge from custody by reason of service or expiration of the maximum sentence imposed by the court for the infamous crime; or
>
> (3) Being granted a certificate of final discharge from supervision by the board of probation and parole pursuant to § 40-28-105, or any equivalent discharge by another state, the federal government, or county correction authority.

Tenn. Code Ann. § 40-29-202(a) (2006). Notwithstanding this provision, convicted felons

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[1] Count Six is not at issue in the State Officials' motion.

remain ineligible to apply for a voter registration card or to have the right to suffrage restored unless they have "paid all restitution to the victim or victims of the offense ordered by the court as part of the sentence," Tenn. Code Ann. § 40-29-202(b), and unless they are "current in all child support obligations." Tenn. Code Ann. § 40-29-202(c).

Plaintiffs Terrence Johnson, Jim Harris and Joshua Roberts are all convicted felons and residents of Tennessee who have served their prison sentences and satisfied the conditions of supervised release, and wish to vote in upcoming elections. They are ineligible under § 40-29-202 to apply for restoration of their voting rights, however, because they owe past-due child support payments and/or restitution to the victims of the crimes for which they were convicted.

II. STANDARD OF REVIEW

A motion for judgment on the pleadings under Rule 12(c) of the Federal Rules of Civil Procedure applies the same standards as a motion to dismiss under Rule 12(b)(6). *Lindsay v. Yates*, 498 F.3d 434, 438 (6th Cir. 2007); *Kottmyer v. Maas*, 436 F.3d 684, 689 (6th Cir. 2006). Under the applicable standard, the court reviews the complaint in the light most favorable to the non-moving party, accepting as true all well pleaded factual allegations. *Commercial Money Ctr., Inc. v. Ill. Union Ins. Co.*, 508 F.3d 327, 336 (6th Cir. 2007) (citing *United States v. Moriarty*, 8 F.3d 329, 332 (6th Cir. 1993)). The court need not accept as true legal conclusions or unwarranted factual inferences contained in the pleadings. *Id.*

(citing *Gregory v. Shelby County*, 220 F.3d 433, 446 (6th Cir. 2000)). To survive the motion, "the complaint must contain direct or inferential allegations respecting all the material elements under some viable legal theory." *Id.* (citing *Mezibov v. Allen*, 411 F.3d 712, 716 (6th Cir. 2005)). *See also Shuptrine v. McDougal Littell*, No. 1:07-cv-181, 2008 WL 400453, at * 1 (E.D. Tenn. Feb.12, 2008) (ruling on a Rule 12(c) motion and identifying the standard for a motion to dismiss under Rule 12(b)(6), in light of *Bell Atl. Corp. v. Twombly*, — U.S. —, 127 S. Ct. 1955, 1974 (2007), as whether the complaint pleads enough facts to state a claim to relief that is plausible on its face).

Although Plaintiffs' motion, like the State Officials', is characterized first as a motion for judgment on the pleadings, the only pleading the Court can consider is the Amended Complaint, as the State Officials have not filed an answer to the Amended Complaint. They did file an answer to the original complaint in which they denied or were without sufficient information to admit or deny most of the factual allegations in the complaint. Regardless, there is no dispute regarding the import and effect of the statutes at issue, and the State Officials, for purposes of the Plaintiffs' motion, do not dispute those facts set forth in the Plaintiffs' Statement of Material Facts. It appears that the issues presented are strictly legal in nature and do

not require the resolution of any factual issues in any party's favor.[2]

III. ANALYSIS AND DISCUSSION

A. Whether § 40-29-202 Violates the Equal Protection Clause

The State Officials argue that subsections (b) and (c) of § 40-29-202 do not violate the Equal Protection Clause of the United States Constitution because: (1) felons do not have a fundamental right to vote; (2) wealth qualifications do not discriminate against a suspect class; and (3) because felons do not have a fundamental right to vote, the statutory limitations on restoration of felon voting rights are subject to a rational-basis analysis, which the State meets. In response, Plaintiffs do not dispute that the State may disenfranchise convicted felons, but essentially argues that once the right to vote is restored, any restrictions on that right should be subject to strict scrutiny. They also argue that § 40-29-202 has a disparate impact on the indigent. Finally, they argue that the distinction made by the statute between those ex-felons who can and cannot pay restitution and past-due child support is not rationally related to any legitimate government purpose and, alternatively, that they should be able

[2] The State Officials do contest the Plaintiffs' factual assertion that the challenged statutory provisions disproportionately affect the indigent.

to conduct discovery in order to present evidence invalidating Defendants' asserted rational basis for the statute. The law simply does not support the Plaintiffs' arguments.

(1) Convicted Felons Do Not Have Fundamental Right to Vote

The Supreme Court has expressly stated that "the exclusion of felons from the vote has an affirmative sanction in [§] 2 of the Fourteenth Amendment." *Richardson v. Ramirez*, 418 U.S. 24, 54 (1974). Based on that finding, the Court held that the California Supreme Court had erred in holding that California's exclusion of convicted felons who had completed their sentences and paroles from the franchise violated the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 56. The Sixth Circuit has interpreted *Richardson v. Ramirez* to mean that felons do not have a fundamental right to vote. *See Wesley v. Collins*, 791 F.2d 1255, 1261 (6th Cir. 1986) ("It is undisputed that a state may constitutionally disenfranchise convicted felons . . . and that the right of felons to vote is not fundamental." (citations omitted)).

(2) Restrictions on Felons' Right to Vote Are Subject to Rational-Basis Test

Other circuits, based on the holding in *Richardson* that felons do not have a fundamental right to vote, have applied the "rational-basis" test rather than strict scrutiny to distinctions among different types of convicted felons with respect to the right to vote. For instance, *Shepherd v. Trevino*, 575

F.2d 1110 (5th Cir. 1978), involved a state statutory scheme that disenfranchised all convicted felons but provided a mechanism for the restoration of voting rights only to those who were convicted in state court and whose convictions were abrogated either by executive pardon or by act of the court of conviction. The statutory scheme did not provide any means for the re-enfranchisement of felons convicted by federal courts unless they received a presidential pardon, over which the state had no control. Plaintiffs, all felons convicted in federal court, asserted that the state statutory scheme violated their equal-protection rights because it provided no mechanism by which they could restore their voting rights. In support of their position, the plaintiffs argued that *Richardson* should be read to mean "only that the state can deprive felons of the right to vote" but that "when a state grants the right to vote to some felons and denies it to others the classifications must be judged by strict scrutiny." *Id.* 1114. The Fifth Circuit rejected that argument as premised upon too narrow a reading of *Richardson*, stating:

> We do not read *Richardson* to hold that the realm of state discretion in disenfranchising persons convicted of felonies is limited to the disenfranchisement of all felons or none. While a narrow reading of *Richardson* might support plaintiffs' position, several aspects of the Court's opinion lead us to conclude that section 2 of the fourteenth amendment blunts the full force of section 1's equal protection clause with respect to the

voting rights of felons. First, the Court noted that it had previously "indicated approval" of a state's disenfranchisement of "some or all convicted felons." 418 U.S. at 53. Second, the issue before the Court was whether California could deny the vote to the class of ex-felons who had completed their sentences and paroles. *See* 418 U.S. at 32 n.10, 33, 56. Thus, although the analysis engaged in by the Court focuses on a state's power to disenfranchise persons convicted of a felony generally, the specific holding of the Court was that a state may deny the franchise to that group of "convicted felons who have completed their sentences and paroles." 418 U.S. at 56. Third, the Court responded to arguments that a state should reenfranchise felons once they have served their terms by saying that such arguments should be directed to the state legislatures. 418 U.S. at 55. Thus, the Court clearly envisioned that a state could grant the right to vote to some persons convicted of a felony while denying it to others. Section 2's express approval of the disenfranchisement of felons thus grants to the states a realm of discretion in the disenfranchisement and reenfranchisement of felons which the states do not possess with respect

> to limiting the franchise of other citizens.

Shepherd, 575 F.2d at 1114.

The Fifth Circuit went on, however, to find that § 2 of the Fourteenth Amendment could not be read to "remove[ ] all equal protection considerations from state-created classifications denying the right to vote to some felons while granting it to others." *Id.* For instance, the court observed, "[n]o one would contend that section 2 permits a state to disenfranchise all felons and then reenfranchise only those who are, say, white. Nor can we believe that section 2 would permit a state to make a completely arbitrary distinction between groups of felons with respect to the right to vote." *Id.* (citations omitted). The court therefore held that "selective disenfranchisement or reenfranchisement of convicted felons must pass the standard level of scrutiny applied to state laws allegedly violating the equal protection clause. Such laws must bear a *rational relationship to the achieving of a legitimate state interest*." *Id.* at 1114–15 (citing *McGowan v. Maryland*, 366 U.S. 420 (1961)) (emphasis added).

Similarly, in *Owens v. Barnes*, 711 F.2d 25 (3d Cir. 1983), the Third Circuit held that a Pennsylvania law that permitted unincarcerated felons to vote but barred incarcerated felons from voting did not violate the equal-protection clause so long as the distinction was "rationally related to a legitimate state interest." *Id.* at 27 (noting that "[i]t follow[ed] [from the Supreme Court's holding in *Richardson*] that the standard of equal protection

scrutiny to be applied when the state makes classifications relating to disenfranchisement of felons is the traditional rational basis standard"). Further, in finding that Pennsylvania's distinction between incarcerated and unincarcerated felons satisfied rational-basis scrutiny, the Third Circuit determined that it was "not bound by the state's inexplicable failure to provide in its brief any rationale for such distinction, . . because we believe the basis is apparent on its face." *Id.* at 28. More specifically, the court found that the state could rationally decide that one of the losses to which an incarcerated prisoner should be subject was that of participation in the democratic process.[3]

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[3] The cases cited by the Plaintiffs are not inconsistent with the above-referenced decisions. For instance, in *Hunter v. Underwood*, 471 U.S. 222, 223 (1985), plaintiffs brought an action challenging a state law disenfranchising persons convicted of "crimes involving moral turpitude." The Supreme Court affirmed the Eleventh Circuit's determination that the provision violated equal protection where it both had a disparate racial impact and was indisputably motivated by a desire to discriminate against blacks on the basis of race. *Hunter* is distinguishable from the case at bar because, among other factors, (1) the *Hunter* plaintiffs challenged the statutory provision only insofar as it barred those convicted of a misdemeanor from voting, rather than a felony; and (2) the provision was affirmatively shown to have a disparate impact upon and to be intended to discriminate on the basis of race – a suspect classification. Likewise, in the earlier case of *Hobson v. Pow*, 434 F. Supp. 362 (N.D. Ala. 1977), the district court applied strict scrutiny to Alabama constitutional and statutory provisions that disenfranchised men upon conviction for "assault and battery on the wife," a misdemeanor, and held that the state had not met the requirement that it show the statute was narrowly tailored to further a compelling state interest, or even a rational basis for disenfranchising wifebeaters but not

Based on the above-referenced cases, this Court also finds, as the State Officials argue, that, because felons do not have a fundamental right to vote, the state's decision to restore voting rights to some convicted felons and not to others is not subject to a strict-scrutiny standard. Rather, the Court must find that such distinctions do not violate equal protection so long as they do not discriminate against a protected class and they bear a rational relationship to a legitimate state interest.

(3) Indigence Is Not a Suspect Classification.

Plaintiffs argue here that the state's discrimination between those felons who are able to pay all restitution ordered by the court as well as any

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others convicted of assault and battery. In other words, *Hobson*, like *Hunter*, involved a misdemeanor rather a felony and also concerned a suspect classification: gender. Moreover, *Hobson*, being a district court decision from a different state and circuit, has no precedential value even if it were on point.

Plaintiffs' emphasis on *Burdick v. Takushi*, 504 U.S. 428 (1992), and *Anderson v. Celebrezze*, 460 U.S. 780 (1983), is similarly unpersuasive, as the Supreme Court in both those cases began its analysis with the presumption that the petitioning voters had a fundamental right to vote, and from there proceeded to determine whether certain limitations imposed on that right are permissible under the circumstances presented. Plaintiffs here, having been convicted of felonies and accordingly stripped of the right to vote among many other privileges and rights associated with citizenship, no longer have a fundamental right to vote. The Court's holding in *Richardson v. Ramirez*, 418 U.S. 24 (1974), continues to control that issue.

past-due child support payments, and those who are not, amounts to a classification based upon wealth. Supreme Court precedent, however, has clearly established that wealth, or lack thereof, is not a "suspect classification." For instance, in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), the Court upheld Texas's system of financing its public schools against an equal-protection challenge, where the funding scheme in question, financed in part by local property taxes, resulted in "substantial interdistrict disparities in school expenditures . . . throughout the State." *Id.* at 15. Notably, for purposes of the case at bar, the Supreme Court, in examining the equal-protection status of these disparities, "declined to apply any heightened scrutiny based either on wealth as a suspect classification or on education as a fundamental right." *Papasan v. Allain*, 478 U.S. 265, 283–84 (citing *Rodriguez*, 411 U.S. at 35). Because public education, though important, was "not among the rights afforded explicit protection under our Federal Constitution," *Rodriguez*, 411 U.S. at 35, the Court concluded that the State's school financing scheme, even though it resulted in funding disparities based on wealth, would be constitutional if it bore "some rational relationship to a legitimate state purpose." *Id.* at 44; *cf. Papasan*, 478 U.S. at 289–92 (likewise concluding that wealth was not a suspect classification, such that the unequal distribution of funding to different school districts was subject to the rational-basis standard, but remanding for reconsideration of the issue under the particular facts of that case). *Cf. Robinson v. Fauver*, 932 F. Supp. 639, 644 (D.N.J. 1996) (stating, for purposes of

analyzing a prison inmate's assertion that a New Jersey statute violated his right to equal protection by discriminating on the basis of indigence, "[w]ealth . . . is not, alone, a suspect class for purposes of equal protection analysis" (citing *Rodriguez*, 411 U.S. at 24)). *See also Romer v. Evans*, 517 U.S. 620, 635 (1996) (holding that a law targeting a non-suspect class of people, in that case gays and lesbians, "must bear a rational relationship to a legitimate governmental purpose").

The cases cited by Plaintiffs do not lead to a different conclusion. Because wealth is not a suspect classification, the Court must uphold the statutory scheme challenged by the Plaintiffs unless it is not rationally related to a legitimate state purpose.

(4) Section 40-29-202 Passes the Rational-Basis Test

The "rational-basis" standard of review of a challenged state statute is extremely deferential to the State. As the Supreme Court has emphatically stated:

> [E]qual protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices. In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is *any reasonably conceivable state of facts that could provide a rational basis for*

> *the classification*. Where there are plausible reasons for Congress' action, our inquiry is at an end. This standard of review is a paradigm of judicial restraint. The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted.

FCC v. Commc'ns, Inc., 508 U.S. 307, 313–14 (1993) (internal quotation marks and citations omitted).

Accordingly, the statute at issues bears "a strong presumption of validity," *id.* at 314–15 (citing *Lyng v. Auto. Workers*, 485 U.S. 360, 370 (1988)), and the Plaintiffs, not the State, bear the burden "to negative every conceivable basis which might support it," *id.* at 315 (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)).

The State Officials suggest several alternative bases in support of § 40-29-202, subparts (b) and (c): (1) that the State has a legitimate interest in protecting the ballot box from felons who continue to break the law by not abiding by enforceable court orders (whether to pay restitution or child support), and that § 40-29-202 is rationally related to this legitimate state interest; (2) that the state has a strong public policy interest in encouraging the payment of child support and thereby promoting the welfare of children, and prohibiting the re-enfranchisement of ex-felons who owe back child

support is rationally related to that legitimate state interest; and (3) that the State has a legitimate interest in encouraging convicted felons to complete their entire sentences, including the payment of restitution, and withholding the restoration of voting rights from felons who have not completed their entire sentence is rationally related to that legitimate State objective. The Court further observes that the State may legitimately determine that only those convicted felons who have fully paid all restitution ordered as part of their sentence are sufficiently rehabilitated to be entitled to vote. *Cf. Shepherd v. Trevino*, 575 F.2d 1110, 1115 (5th Cir. 1978) (holding that the Texas system for restoring convicted felons to the franchise, which only provided a mechanism for restoration of voting rights to those felons convicted in state as opposed to federal court, bore a rational relationship to the state's interest in limiting the franchise to "responsible voters"); *Coronado v. Napolitano*, No. CV-07-1089-PHX-SMM, 2008 WL 191987, at *4 (D. Ariz. Jan. 22, 2008) (recognizing that rehabilitation is one of the goals of requiring restitution as part of a criminal sentence, and holding that requiring payment in full of restitution is rationally related to that legitimate governmental interest).

In light of the highly deferential rational-basis analysis, the Court is compelled to find that the challenged statutory provisions are rationally related to legitimate state interests and therefore do not violate Plaintiffs' right to equal protection. With regard to Plaintiffs' insistence that they should be able to conduct discovery and present evidence to rebut the State Officials' asserted rational bases for

the statute, the law, again, simply does not support Plaintiffs' position. As the Supreme Court has stated:

> [B]ecause we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature. . . . In other words, a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data.

FCC v. Beach Commc'ns, 508 U.S. at 315. Accordingly, although the burden is clearly upon the Plaintiffs as the challenging party "to negative any reasonably conceivable state of facts that could provide a rational basis for the classification," *Bd. of Trustees v. Garrett* 531 U.S. 356, 360 (2001) (internal quotation marks and citations omitted), Plaintiffs must carry that burden by resorting to logic rather than to discovery.

They attempt to do so by insisting that "denying a citizen access to a fundamental right 'for failing to do that which they cannot do' is irrational and cannot survive any level of scrutiny." (Doc. No. 67, at 16, quoting *Zablocki v. Redhail*, 434 U.S. 374, 394 (1978) (Stewart, J., concurring in judgment).).[4]

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[4] In *Zablocki*, the Supreme Court overturned a Wisconsin statute which provided that no person having minor children not in his or her custody and for whom he or she owed child support could marry without court approval. A majority of the

Simply asserting the State's action is irrational does not make it so. The State has asserted rational reasons for the legislation, and, as already discussed, the fact that the statute may discriminate on the basis of wealth is not, alone, a reason for striking it down.[5]

Court, lead by Justice Marshall, held that marriage was a right of "fundamental importance," that the statute at issue significantly interfered with that right, and therefore that the statute was subject to strict scrutiny. 434 U.S. at 383. The Court further found that the statute at issue was not narrowly tailored to further a compelling state interest and therefore violated the Equal Protection Clause. Justice Stewart filed an opinion concurring in judgment in which he observed that the "Equal Protection Clause deals not with substantive rights or freedoms but with invidiously discriminatory classifications," of which race was the paradigmatic example. *Id.* at 391 (Stewart, J., concurring). On that basis, Justice Stewart believed that the statute was problematic, not because it affected some people differently than others but because it was an unwarranted encroachment upon a constitutionally protected freedom and therefore violated the Due Process Clause of the Fourteenth Amendment. Read in context, the statement quoted in the Plaintiffs' brief should be read to assert that, insofar as the government's objective was to obtain payment from persons wishing to marry and thereby to reduce the State's welfare load, it was irrational for the State to expect to further that interest by requiring payment from those who were indigent and could not pay. Justice Stewart also recognized however, that the State's requirement was "substantially more rational if viewed as a means of assuring the financial viability of future marriages." *Id.* He just questioned whether the statute was narrowly tailored to further that objective.

[5] Plaintiffs have not addressed the question of whether they may be able to obtain a Court order modifying their child-support obligations or either reducing or eliminating their obligation to pay past-due amounts based on their financial

Further, the Court is cognizant of the fact that the statutory requirement that convicted felons be current in all child-support payments before being eligible for reenfranchisement bears a particularly tenuous relationship with any legitimate state objective particularly when, as appears to be the case for plaintiffs Johnson and Harris, the parent owing past-due child support actually has custody of the child and cannot in any sense be charged with being a "dead-beat" parent. Plaintiffs argue that this restriction on voting-rights restoration is no more rational than a requirement that a convicted felon be current on mortgage payments or credit card bills before being permitted to register to vote. Plaintiffs may well be correct, but the fact remains that Tennessee has a legitimate interest in encouraging payment of child support obligations, and § 40-29-202(c) is not unrelated to the promotion of that interest.

Essentially the only real argument Plaintiffs offer in their attempt to negate the validity of the State Officials' proffered rational basis for the legislation at issue is that "[t]here is no reason to believe that the non-payment of an often sizeable financial obligation immediately upon release from supervision can in any way be used as a proxy for determining a citizen's commitment to abide by the laws. If anything, the [legal financial obligation] requirement creates a serious barrier for purposes of rehabilitation and reintegration into society . . . ."

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status. Nor have they addressed what effect doing so might have on their eligibility to register to vote.

(Doc. No. 67, at 16.) While Plaintiffs may well be correct, their argument is best addressed to the state legislature. *Cf. Richardson v. Ramirez*, 418 U.S. at 55 (acknowledging the respondents' argument "that it is essential to the process of rehabilitating the ex-felon that he be returned to his role in society as a fully participating citizen when he has completed the serving of his term," but also recognizing that it was not the Court's role "to choose one set of values over the other," and that policy arguments of this type were more appropriately "addressed to the legislative forum which may properly weigh and balance them against those advanced in support of California's present constitutional provisions") *Id.*

In sum, the Court finds that subsections (b) and (c) of Tenn. Code Ann. § 40-29-202, the provisions challenged by Plaintiffs, do not violate the Equal Protection Clause. The first and second counts of Plaintiffs' Amended Complaint are therefore subject to dismissal.

B. Whether § 40-29-202 Violates the Twenty-Fourth Amendment

Section 1 of the Twenty-Fourth Amendment to the United States Constitution states:

> The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United

> States or any State by reason of failure to pay any poll tax or other tax.

The Supreme Court has construed the Voting Rights Act as creating a private right of action to enforce the Twenty-Fourth Amendment's prohibition against imposition of a poll tax. *Morse v. Republican Party of Va.*, 517 U.S. 186, 231 (1996).

The Supreme Court first had occasion to construe this Amendment in the case of *Harman v. Forssenius*, 380 U.S. 528 (1965), where it noted the purposes and concerns that prompted its passage:

> One of the basic objections to the poll tax was that it exacted a price for the privilege of exercising the franchise. . . . Another objection to the poll tax raised in the congressional hearings was that the tax usually had to be paid long before the election—at a time when political campaigns were still quiescent—which tended to eliminate from the franchise a substantial number of voters who did not plan so far ahead. The poll tax was also attacked as a vehicle for fraud which could be manipulated by political machines by financing block payments of the tax. In addition, and of primary concern to many, the poll tax was viewed as a requirement adopted with an eye to the disenfranchisement of Negroes and applied in a discriminatory manner.

Id. at 539–40 (footnotes omitted). The Court applied the Amendment in that case to strike down a Virginia statute that required voters either to pay the same poll tax still required at that time in state elections or to file a certificate of residence six months prior to the election, largely on the basis that states "may not impose a penalty on those who exercise a right guaranteed by the Constitution." *Id.* at 540 (citations omitted). A year later, the Court struck down Virginia's poll tax altogether, even as it applied to state elections, on equal-protection grounds. *Harper v. Va. Bd. of Elections*, 383 U.S. 663 (1966).

Neither the Supreme Court nor any Circuit Court of Appeals has, based on this Court's research, ever applied the Twenty-Fourth Amendment in any context that did not involve an explicit and unambiguous poll tax.[6] The Second Circuit case on

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[6] *See, e.g., Gonzalez v. Arizona*, 485 F.3d 1041, 1049 (9th Cir. 2007) (in a case involving a Twenty-Fourth Amendment challenge to a state statute requiring persons wishing to register to vote for the first time present proof of citizenship, the court rejected plaintiffs' argument that the statute required some citizens to spend money to obtain documents necessary to register to vote and therefore amounted to a tax on voting, on the grounds that voters did not have to choose between paying a poll tax and providing proof of citizenship when registering to vote, nor did the challenged provision "make[ ] the affluence of the voter or payment of any fee an electoral standard" (quoting *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 666 (1966)); *Johnson v. Bush*, 405 F.3d 1214, 1216 n.1 (11th Cir. 2005) (en banc) (rejecting a challenge to Florida's felon disenfranchisement law and observing, in a footnote, that although the plaintiffs also challenged the law as a violation of state and federal prohibitions against poll taxes, it did not

which the Plaintiffs rely, *Bynum v. Connecticut Commission on Forfeited Rights*, 410 F.2d 173 (2d Cir. 1969), is not to the contrary. In that case, the plaintiff brought suit asserting that Connecticut, having agreed to permit ex-felons to regain vote and having established administrative machinery for that purpose, could not then deny access to the right to vote solely because an ex-felon is too poor to pay the required fee of five dollars. The plaintiff sought injunctive and declaratory relief and also requested the district court convene a three-judge panel to review his claim, a three-judge panel being the only mechanism available at the time for enjoining enforcement of a state statute. The district court

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actually reach the question of "whether conditioning an application for clemency on paying restitution would be an invalid poll tax"); *Howard v. Gilmore*, No. 99-2285, 2000 WL 203984, at *2, (4th Cir. Feb. 23, 2000) (rejecting an ex-felon's claim that the requirement that he pay a ten dollar fee in order to begin the process of having his civil rights restored --and consequently his right to vote violated the Twenty-Fourth Amendment, stating, "it is not [plaintiff's] right to vote upon which payment of a fee is being conditioned; rather, it is the restoration of his civil rights upon which the payment of a fee is being conditioned. Consequently, [plaintiff] states no claim under the Twenty-fourth Amendment."); *Beare v. Briscoe*, 498 F.2d 244, 245 n.1 (5th Cir. 1974) (affirming the district court's holding that a Texas voter registration requirement violated the Equal Protection Clause but observing, in a footnote, that it was "unnecessary to consider the [plaintiffs'] alternative argument that on the facts of this case, annual voter registration is a substantive equivalent of a poll tax and thus conflicts with the due process clause of the Fourteenth Amendment and the Twenty-Fourth Amendment").

denied the request for a three-judge panel and dismissed the claims. The Second Circuit reversed, holding simply that the claimant raised a "substantial question which merits the consideration of a three-judge court." *Id.* at 175. Notably, *Bynum* predates *Richardson v. Ramirez*, such that even if the Second Circuit had reached any holding or directed the three-judge panel as to how it should rule on the plaintiff's claims, its decision would be of limited precedential value.

The few district courts of which this Court is aware that have considered the precise question raised here have concluded that statutes requiring convicted felons to pay all court-ordered restitution before having their voting rights restored do not violate the Twenty-Fourth Amendment. For instance, in the case of *Johnson v. Bush*, 214 F. Supp. 2d 1333 (S.D. Fla. 2002), *aff'd on other grounds*, 405 F.3d 1214 (11th Cir. 2005) (*en banc*), the court distinguished between a condition imposed on the restoration of voting rights once those rights had been legally stripped, and a tax on a still-existing right to vote:

> An unconstitutional poll tax . . . directly burdens the exercise of an individual's proper exercise of their right to vote. As previously stated in this order, the State has permissibly stripped Plaintiffs of their right to vote along with other civil rights pursuant to their felony convictions. The State is not constitutionally obligated to return this right to them

> on completion of their sentence. The victim restitution requirement, then, does not unduly burden the exercise of their right to vote given that that right has already been stripped from them. The victim restitution requirement is not a special fee that they must pay in order to exercise a right already existing in them, but a requirement made within the authority of the State to begin the process of having their civil rights fully restored.

Id. at 1343 (footnotes and citation omitted).

In another very recent opinion, the District of Arizona considered a Twenty-Fourth Amendment challenge to a state statute requiring ex-felons to pay all court-ordered victim restitution before they could regain the right to vote. *Coronado v. Napolitano*, No. CV-07-1089-PHX-SMM, 2008 WL 191987, at *4–*5 (D. Ariz. Jan. 22, 2008). In reaching its decision, the court first observed that felons in Arizona have no right to vote—fundamental or otherwise—that could be abridged by the statutes they challenged since that right had been lawfully stripped once they were convicted of a felony. Thus, the restoration of civil rights once they have been lawfully stripped is a "creature of statute," *id.* at *5 (quoting *State v. Buonafede*, 814 P.2d 1381, 1383 (Ariz. 1991)). The court continued:

> The question remains whether Plaintiffs state a claim on the grounds that the fines and restitution

requirement denies them the right to vote "for reason of failure to pay a poll tax or any other tax." U.S. Const. amend. XXIV. That inquiry turns on whether the fines and restitution requirement constitutes a "tax," as Plaintiffs allege that their civil rights would otherwise be automatically restored under A.R.S. § 13-912.

"Poll tax" is defined as "a fixed tax levied on each person within a jurisdiction.["] Black's Law Dictionary 1498 (8th ed.2004). "Poll taxes are laid upon persons . . . to raise money for the support of government or some more specific end." *Breedlove v. Suttles*, 302 U.S. 277, 281 (1937), *overruled on other grounds by Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966). Although a state may not make "the affluence of the voter or payment of any fee an electoral standard," states do have "the power to fix qualifications." *Harper*, 383 U.S. at 666, 668. States may permissibly fix as a qualification for voting the requirement that a persons [sic] not have been convicted of a felony. It follows that, having decided to re-enfranchise exfelons, Arizona may permissibly fix as a qualification the requirement that those individuals complete the terms

> of their sentences. The Arizona laws do not make ability to pay "an electoral standard," but limit re-enfranchisement to those who have completed their sentences— including the payment of any fine or restitution imposed.

Coronado, 2008 WL 191987, at *5 (footnote and some citations omitted). On that basis, the court rejected the plaintiffs' Twenty-Fourth Amendment challenge.

This Court finds the reasoning employed by the District of Arizona and the Southern District of Florida to be persuasive. Plaintiffs here, having been convicted of committing a felony, no longer have a fundamental right to vote, so the statutory limitations on the restoration of that right do not impinge a right already granted, but instead define the conditions upon which restoration of that right will be premised. It is not unreasonable or impermissible for a state to require a convicted felon to complete his entire sentence, including the payment of restitution,[7] prior to having his voting rights restored. Further, although payment of child support is not part of the Plaintiffs' sentences, the obligation is a legal one that arises from a court order. Imposing a requirement that convicted felons comply with such outstanding court orders cannot reasonably be construed as a "tax" on voting. The policy decisions that led to the passage of the

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[7] Plaintiff's argument that in Tennessee, payment of restitution is not part of a felon's "sentence" is simply incorrect.

challenged statutory provisions do not raise any of the concerns that resulted in the prohibition of poll taxes in the first place.

Because Plaintiffs come to the bar already stripped of their fundamental right to vote and because the requirements imposed by statute cannot be deemed taxes, the Twenty-Fourth Amendment's prohibition on poll taxes simply is not implicated.

In sum, the Court finds that the statutory provisions at issue do not violate the Twenty-Fourth Amendment, and Count Three of Plaintiffs' Amended Complaint must therefore be dismissed.

C. Whether § 40-29-202 Violates the Ex Post-Facto Clause of the U.S. or Tennessee Constitutions

Tennessee's felon re-enfranchisement law was amended in 2006, at which time subsections (b) and (c) of Tenn. Code Ann. § 40-29-202 were enacted. Prior to 2006, Tennessee law did not require a convicted felon to pay all restitution or to be current on child-support payments before having his or her voting rights restored. Thus, under the prior re-enfranchisement provisions, Plaintiffs, who were all convicted prior to 2006, would have been eligible to have their voting rights restored. Plaintiffs insist that the 2006 amendments, by interfering with their ability to apply for a voter's registration card, retroactively increase the penalties and punishment to which they are subject for their crimes and that they therefore violate the Ex Post Facto Clauses contained in the Tennessee and United States Constitutions.

Article 1, Section 11 of the Tennessee Constitution states that "laws made for the punishment of acts committed previous to the existence of such laws, and by them only declared criminal, are contrary to the principles of a free Government; wherefore no Ex post facto law shall be made." Similarly, the United States Constitution provides that "[n]o State shall . . . pass any . . . ex post facto Law." U.S. Const., Art. 1, § 10. Although the Tennessee Supreme Court has construed the state provision to have a broader reach than its federal counterpart, *Utley v. Tenn. Dep't of Corrections*, 118 S.W.3d 705, 715 (Tenn. Ct. App. 2003), when a party raises a challenge under both state and federal Ex Post Facto Clauses, the Tennessee appellate courts conduct a single analysis for both claims, and they follow United States Supreme Court precedent when interpreting both the federal and state clauses. *Doe v. Bredesen*, 507 F.3d 998, 1008 (6th Cir. 2007) (citing *King v. Tenn. Bd. of Paroles*, No. M2005-2821-COA-R3-CV, 2007 WL 1555815 (Tenn. Ct. App. May 29, 2007); *Powers v. Tenn. Bd. of Probation & Paroles*, No. M2005-1529-COA-R3-CV, 2007 WL 1515141, at *7 (Tenn. Ct. App. May 23, 2007); *In re Rahim*, No. M2006-2216-COA-R3-CV, 2007 WL 1308322, at *2 (Tenn. Ct. App. May 3, 2007)).

The Ex Post Facto Clause of the United States Constitution prohibits laws that punish retrospectively. " '[A] law is retrospective if it changes the legal consequences of acts committed before its effective date.' " *United States v. Davis*, 397 F.3d 340, 347 (6th Cir. 2005) (quoting *Miller v. Florida*, 482 U.S. 423, 430 (1987)). " '[T]he focus of

the ex post facto inquiry,' " however, " 'is not whether a legislative change produces some ambiguous sort of 'disadvantage' . . . but on whether any such change alters the definition of criminal conduct or increases the penalty by which the crime is punishable.' " *Dyer v. Bowlen*, 465 F.3d 280, 289 (6th Cir. 2006) (quoting *Cal. Dep't of Corr. v. Morales*, 514 U.S. 499, 506 n.3 (1995)).

When evaluating an ex post facto claim, the Court's first task is to "ascertain whether the legislature meant to establish 'civil' proceedings." *Smith v. Doe*, 538 U.S. 84, 92 (2003) (quoting *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997).) If the intent of the legislature was to impose punishment, that ends the inquiry. If, however, " 'the intention was to enact a regulatory scheme that is civil and nonpunitive, we further examine whether the statutory scheme is so punitive either in purpose or effect as to negate [the State's] intention' to deem it 'civil.' " *Hendricks*, 521 U.S. at 361 (quoting *United States v. Ward*, 448 U.S. 242, 248–49 (1980)). Because courts "ordinarily defer to the legislature's stated intent, . . . only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty[.]" *Smith*, 538 U.S. at 92 (internal citations and quotations omitted).

"Whether a statutory scheme is civil or criminal 'is first of all a question of statutory construction.'" *Smith*, 538 U.S. at 92 (quoting *Hendricks*, 521 U.S. at 361) (other citation omitted). This Court must consider the statute's text and its structure to determine the legislative objective.

Smith, 538 U.S. at 92– 93 (citing *Flemming v. Nestor*, 363 U.S. 603, 617 (1960)). The first question then is whether the Tennessee legislature, in amending the felon franchise restoration provisions, "indicated either expressly or [implicitly] a preference for one label or the other," *i.e.*, civil or criminal. *Smith*, 538 U.S. at 93 (quoting *Hudson v. United States*, 522 U.S. 93, 99 (1997)).

Plaintiffs here insist that the provisions they challenge are criminal and punitive in nature, citing the recent case of *May v. Carlton*, 245 S.W.3d 340, 349 (Tenn. 2008), in which the Tennessee Supreme Court held that "laws disenfranchising felons are penal in nature." *See also Gaskin v. Collins*, 661 S.W.2d 865, 868 (Tenn. 1983) (holding that the Ex Post Facto Clause of the Tennessee Constitution "prohibits the General Assembly from retroactively disenfranchising convicted felons who have never been adjudged infamous"). Plaintiffs also point out that the provision at issue falls within the "Criminal Procedure" section of the Tennessee Code, which Plaintiffs insist "further establishes that Tennessee's disenfranchisement law is an additional criminal penalty for conviction." (Doc. No. 67, at 22.)

In reality, although the challenged statute falls within Title 40 of the Tennessee Code, "Criminal Procedure," it also falls within the Chapter entitled "Restoration of Citizenship," the purpose of which is clearly not punitive in nature. Moreover, although laws disenfranchising felons are punitive in nature, laws providing for the *re-enfranchisement* of felons are not. The Court concludes that the statutory provisions at issue were not intended to be

punitive or criminal in nature. Rather, they are civil, nonpunitive measures for regulating applications to have the right to vote restored.

Notwithstanding that conclusion, the Court must still " 'analyze the practical effect of the challenged provisions," considering such factors as whether the State's re-enfranchisement scheme "has been regarded in our history and traditions as a punishment; imposes an affirmative disability or restraint; promotes the traditional aims of punishment; has a rational connection to a nonpunitive purpose; or is excessive with regard to this purpose.' " *Doe v. Bredesen*, 507 F.3d 998, 1004 (6th Cir. 2007) (quoting *Smith*, 538 U.S. at 97) (other citations omitted). These factors, although most relevant, "are not necessarily exhaustive or dispositive." *Doe*, 507 F.3d at 1005 (citing *Smith*, 538 U.S. at 97).

There is no evidence that the State's re-enfranchisement scheme has traditionally been regarded as punitive, and it does not promote the traditional aims of punishment. Further, while the law disenfranchising felons as an initial matter may certainly be construed to impose an affirmative disability, it is not reasonable to construe the laws regulating the restoration of voting rights as doing so. Finally, as discussed above in connection with Plaintiff's Equal Protection Clause claim, the State's scheme has a rational connection to a non-punitive purpose and is not excessive in that regard. Plaintiffs have not pointed to any other factors that should be considered relevant, and the Court concludes that the State's re-enfranchisement scheme is not

punitive in nature. On that basis alone, Plaintiffs' Ex Post Facto Clause claims must fail.

Even if § 40-29-202(b) and (c) are considered to be punitive in nature, however, Plaintiffs' claim still fails because the provisions neither alter the definition of the crimes for which the Plaintiffs were convicted nor increase the punishment associated therewith. More specifically, the challenged provisions do not change the fact that Plaintiffs' right to vote was stripped at the time they first were convicted of an "infamous crime," which is the critical distinction between the case at bar, on the one hand, and *May* and *Gaskin* on the other. In those cases, upon which Plaintiffs here rely, the definition of a crime, that is, whether it was considered a felony or a misdemeanor, changed after the plaintiffs' convictions. In the case at bar, however, the definition of Plaintiffs' crimes has not changed, nor has the punishment: disenfranchisement. The statutes pertaining to felon re-enfranchisement do not "increase" that punishment merely by redefining what is required in order to have one's voting rights restored, even if that redefinition makes it more difficult for some felons to be eligible to apply to vote. As the State Officials point out, before the passage of the challenged statutory provisions, Plaintiffs were ineligible to vote. After their passage, Plaintiffs remained ineligible to vote. The only thing that has changed are the conditions governing their ability to regain the right of suffrage.

Plaintiffs' claims under the Ex Post Facto Clauses of the Tennessee and United States Constitutions will therefore be dismissed.

D. Whether § 40-29-202 Violates the Privileges and Immunities Clause of the U.S. and Tennessee Constitutions

Plaintiffs do not cite, nor has the Court discovered, any case stating that the right to vote in federal elections is a privilege or immunity of the citizens of the United States. Even assuming for purposes of this motion that the right to vote is a privilege or immunity of the citizens of the United States, Plaintiffs' claim under the Privileges or Immunities Clause of the Fourteenth Amendment fails for the same reasons as their claims under the Equal Protection Clause (Counts One and Two). The "privilege" or right of ex-felons to vote in federal elections can be suspended without violating the Constitution. *Richardson v. Ramirez*, 418 U.S. at 56. Plaintiffs therefore cannot legitimately claim that the privilege has been "abridged" in violation of the Privileges or Immunities Clause of the Fourteenth Amendment. Quite simply, a practice that is authorized under § 2 of the Fourteenth Amendment cannot be deemed prohibited under § 1. Moreover, to the extent Tennessee's re-enfranchisement scheme does abridge Plaintiffs' right or privilege to vote, it is rationally related to a legitimate governmental interest as discussed above in connection with Plaintiffs' Equal Protection Clause challenge.

IV. PLAINTIFFS' MOTION FOR JUDGMENT

For all the reasons discussed above, the Court finds that the State Officials are entitled to judgment in their favor, and Counts One through Five of the Plaintiffs' amended complaint will be dismissed. Plaintiffs' motion for judgment on the pleadings is premised upon the same arguments raised in their opposition to the State Officials' motion, none of which is availing. The Plaintiffs' motion must therefore be denied.

V. CONCLUSION

For the reasons stated above, the State Officials' motion for judgment on the pleadings will be granted and the Plaintiffs' motion denied. Because plaintiff Alexander Friedmann's due process claim under Count VI of the Amended Complaint remains in play, the matter will be remanded back to Magistrate Judge Griffin for further case management as necessary.

An appropriate Order will enter.

___/s/_____

Thomas A. Wiseman, Jr.
Senior U.S. District Judge

No. 10-1149

In the Supreme Court of the United States

TERRENCE JOHNSON, JIM HARRIS, JOSHUA ROBERTS,

Petitioners,

v.

BILL HASLAM, Governor of the State of Tennessee; MARK GOINS, Coordinator of Elections; TRE HARGETT, Secretary of State of Tennessee; RICHARD HOLDEN, Administrator of Elections for Shelby County; KIM BUCKLEY, Administrator of Elections for Madison County; ALBERT E. TIECHE, Administrator of Elections for Davidson County, in their official capacities,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

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April 20, 2011

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QUESTIONS PRESENTED FOR REVIEW

1. Whether conditions placed on felon re-enfranchisement comport with equal protection requirements where, because felons do not have a fundamental right to vote, the State must show only a rational basis for the conditions and the conditions imposed by the State are rationally related to legitimate state interests.

2. Whether, because felons have been constitutionally stripped of the right to vote, conditioning their re-enfranchisement upon paying court-ordered victim's restitution and child support obligations implicates the Twenty-Fourth Amendment's prohibitions on conditioning the right to vote on payment of poll taxes or other taxes.

3. Whether the Sixth Circuit exceeded its judicial authority in affirming the District Court's decision that the enactment of the Tennessee Statutes did not violate the Ex Post Facto Clause of the Tennessee Constitution.

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The October 28, 2010, opinion of the United States Court of Appeals for the Sixth Circuit, which affirmed the district court judgment dismissing the amended complaint, is reported at 624 F.3d 742 (6th Cir. 2010). (Pet. App. 1a-88a). The order denying rehearing and rehearing en banc is also reported at 624 F.3d 742. (Pet. App. 89a-90a). The memorandum opinion of the district court dismissing the amended complaint is reported at 579 F. Supp. 2d 1044 (M.D. Tenn. 2008). (Pet. App. 91a-126a).

JURISDICTION

Petitioners invoke this Court's jurisdiction under 28 U.S.C. §1254.

STATEMENT OF THE CASE

The State of Tennessee disenfranchises convicted felons but provides a statutory procedure for regaining the franchise upon completion of their sentences and satisfaction of certain conditions. Tennessee's re-enfranchisement statute provides that a convicted felon may apply for a voter registration card and seek to regain the right of suffrage upon:

(1) Receiving a pardon, except where the pardon contains special conditions pertaining to the right of suffrage;

(2) The discharge from custody by reason of service or expiration of the maximum sentence imposed by the court for the infamous crime; or

> (3) Being granted a certificate of final discharge from supervision by the board of probation and parole pursuant to § 40-28-105, or any equivalent discharge by another state, the federal government, or county correction authority.

Tenn. Code Ann. § 40-29-202(a) (2006). This statute carves out two exceptions to re-enfranchisement eligibility:

> (b) . . . a person shall not be eligible to apply for a voter registration card and have the right of suffrage restored, unless the person has paid all restitution to the victim or victims of the offense ordered by the court as part of the sentence[, and]
>
> (c) . . . a person shall not be eligible to apply for a voter registration card and have the right of suffrage restored, unless the person is current in all child support obligations.

Tenn. Code Ann. § 40-29-202(b) – (c).

Petitioner Johnson was convicted of wire fraud in 1999, and the court sentenced him to a term of imprisonment and ordered him to pay $40,000 in restitution. Petitioner Johnson has completed his prison term but remains unable to satisfy the restitution order. Additionally, petitioner Johnson owes a significant amount in court-ordered child support payments. Petitioners Harris and Roberts both have multiple felony convictions. While they have completed their prison terms for these convictions, they both owed child support obligations

($2,500 and $7,000) at the time they filed suit. Petitioner Harris has since paid his overdue child support and thus faces no impediment to applying for re-enfranchisement; however, he continues to press a claim for nominal damages on account of any past constitutional harm. (Pet. App. 4a).

On February 25, 2008, petitioners filed suit in the Middle District of Tennessee, challenging the constitutionality of the re-enfranchisement statute's restitution and child support provisions, asserting that these provisions violate the Fourteenth Amendment's Equal Protection Clause, the Twenty-Fourth Amendment, the Privileges and Immunities Clauses of the federal and state constitutions, and the Ex Post Facto Clauses of the federal and state constitutions. On August 1, 2008, the state defendants filed a motion for judgment on the pleadings as to all of the petitioners' claims pursuant to Fed. R. Civ. P. 12(c). The petitioners filed a cross-motion under Fed. R. Civ. P. 12(c) or, in the alternative, a motion for partial summary judgment pursuant to Fed. R. Civ. P. 56(a). A hearing was held on the parties' respective motions on September 3, 2008. On September 28, 2008, the district court issued a memorandum opinion finding in favor of the state defendants on all of the constitutional challenges and dismissed petitioners' amended complaint. (Pet. App. 91a-126a).

A divided, three-judge panel of the Sixth Circuit affirmed the judgment. (Pet. App. 1a-88a). The majority first recognized that a state may constitutionally disenfranchise convicted felons and that the right of felons to vote is not fundamental. Accordingly, it found that because Tennessee's re-enfranchisement law neither implicates a fundamental

right nor targets a suspect class, the district court properly applied rational basis review to the petitioners' equal protection challenge. (Pet. App. 7a-8a). The court then found that "the state's interests of encouraging payment of child support and compliance with court orders, and requiring felons to complete their entire sentences, including paying victim restitution, supply a rational basis for the challenged statutory provisions sufficient to pass constitutional muster." (Pet. App. 9a).

With respect to petitioners' Twenty-Fourth Amendment claims, the majority held that, "[a]s convicted felons constitutionally stripped of their voting rights by virtue of their convictions, Plaintiffs possess no right to vote and, consequently, have no cognizable Twenty-Fourth Amendment claim." (Pet. App. 18a). The court further held that Tennessee's re-enfranchisement law does not condition the right to vote on payment of restitution or child support, but instead conditions the restoration of a felon's right to vote on such payment, which is not addressed by the Twenty-Fourth Amendment. (Pet. App. 18a). Finally, the court held that even if the Twenty-Fourth Amendment applied, restitution and child support represent legal financial obligations incurred by the petitioners themselves and, therefore, fail to qualify as the sort of taxes the Amendment seeks to prohibit. (Pet. App. 19a).

The court also rejected petitioner's ex post facto claim under the Tennessee Constitution,[1] finding no

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[1] Although petitioners had challenged the statute under the Ex Post Facto Clauses of both the United States and Tennessee

evidence that the legislature enacted the challenged provisions with punitive intentions or that the statute's purpose or effect had negated the legislature's non-punitive intentions. The court further found that the restitution and child-support-payment provisions bore a rational connection to legitimate non-punitive interests of the state and are not excessive with regard to those purposes. (Pet. App. 22a-23a).

On November 10, 2010, petitioners filed a petition for rehearing en banc with the Sixth Court, which was denied on December 17, 2010. (Pet. App. 89a-90a). Petitioners now seek this Court's review.

REASONS FOR DENYING REVIEW

Petitioners present three questions on which they seek review by this Court. The first is whether Tennessee's felon re-enfranchisement statutes may condition the restoration of a felon's voting rights upon: (a) the payment of victim's restitution and child support obligations regardless of the felon's ability to satisfy those debts[2]; and (b) the payment of child

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Constitutions, they "appeal[ed] only the rejection of their Tennessee Constitutional Claim." (Pet. App. 21a).

[2] The opinion of the District Court that disposed of this matter was the result of Respondents' motion pursuant to Rule 12(c) of the Federal Rules of Civil Procedure. As a result, the District Court was limited to consideration of the Amended Complaint. *See* (Pet. App. 96a) (stating, "the only pleading the Court can consider [in ruling on Respondents' motion] is the Amended Complaint."). Nowhere in the Amended Complaint do the petitioners assert that any one of them is indigent or unable to pay their court-ordered restitution or child support obligations.

support when such payment is unrelated to the person's underlying conviction. As every United States court of appeals considering a similar question has held, because felons, properly stripped of their right to vote, do not have a fundamental right to vote, the State must show only a rational basis for placing conditions on felon re-enfranchisement. Here, there is a rational basis for the conditions of requiring felons to have paid the court-ordered victim's restitution and their court-ordered child support obligations. One such basis is protecting the ballot box from past law-breaking felons who continue to refuse to abide by the laws of the State, and there are numerous others.

Petitioners' second question is whether the state statutes in question violate the Twenty-Fourth Amendment's prohibition on conditioning a citizen's right to vote on payment of poll taxes or other taxes. First, as every United States court of appeals considering similar questions has concluded, felons who have been stripped of their right to vote do not have a right to vote to abridge, thus removing the question from the scope of the Twenty-Fourth Amendment. Second, even if the Twenty-Fourth Amendment were implicated, victim's restitution and child support obligations are not "taxes."

Petitioners' third question presented for review by this Court is whether the Court of Appeals for the Sixth Circuit exceeded its judicial authority in ruling

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As a result, petitioners do not have a cognizable injury upon which to base their standing to challenge the statutes effect on those who cannot afford the required payments. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

that enactment of Tennessee's felon voter re-enfranchisement statutes did not violate the Ex Post Facto Clause of the Tennessee Constitution. First, to the extent petitioners are actually challenging the merits of the ruling of the court below, the issue is one purely of state law, not justifying intervention by this Court. Second, to the extent that the question presented is actually whether the court below exceeded its authority, it certainly did not, as the federal court had supplemental jurisdiction to entertain purely state law claims that were part of a matter that presented primarily federal questions. Third, petitioners do not challenge the legal standard the court below applied in its Ex Post Facto analysis, as it was the correct standard, again making it the sort of question not typically entertained by this Court. Fourth, and finally, the court below was correct in its application of the facts to the legal standard.

I. THE DECISION OF THE SIXTH CIRCUIT DOES NOT CONFLICT WITH PRIOR DECISIONS OF THIS COURT AND PRIOR DECISIONS OF OTHER LOWER COURTS IN HOLDING THAT CONDITIONS TO FELON RE-ENFRANCHISEMENT MUST ONLY BE RATIONALLY RELATED TO A LEGITIMATE STATE INTEREST.

Petitioners' claims throughout the litigation have been falsely premised upon the idea that convicted felons, constitutionally stripped of their right to vote, have a fundamental right to re-enfranchisement, and that any conditions on re-enfranchisement must meet the strict requirements of the cases striking down preconditions to voting for non-felons. In furtherance of that false premise, petitioners mistakenly cite to

United States Supreme Court and lower court opinions striking down numerous state-enacted conditions on the right to vote for non-felons. Those opinions, however, were all based upon the Court's application of a strict scrutiny analysis, as voting is a fundamental right for non-felon citizens that are of majority age. As a result, petitioners' claim that the Sixth Circuit's decision here conflicts with prior decisions of this Court and of lowers courts is incorrect.

A. Felons Do Not Have a Fundamental Right to Vote, and Any Conditions On Felon Re-Enfranchisement Are Subject to the Rational Basis Standard. As a Result, Decisions of This Court and Other Circuit Courts Analyzing State-Imposed Conditions On Non-Felons' Fundamental Right to Vote Are Inapposite.

The Equal Protection Clause bars states from making distinctions that burden a fundamental right or target a suspect class without demonstrating a compelling or substantial state interest. *See Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 457 (1988). In instances where a state makes distinctions that do not implicate a fundamental right or burden a suspect class, the state must only demonstrate a rational basis for the distinction. *See Romer v. Evans*, 517 U.S. 620, 631 (1996).

Here, the Tennessee statutes in question target felons and places conditions on their re-enfranchisement process by requiring payment of restitution and child support obligations.

As the Sixth Circuit correctly held, the Tennessee statute disenfranchising felons is constitutional. (Pet. App. 7a) (citing *Richardson v. Ramirez*, 418 U.S. 24, 54 (1974)). Furthermore, having been constitutionally stripped of that right, felons no longer have a fundamental interest in voting or re-enfranchisement to assert. (*Id.* at 7a-8a) (citing *Wesley v. Collins*, 791 F.2d 12355, 1261 (6th Cir. 1986).). Finally, as the Sixth Circuit correctly pointed out, and as this Court has held, wealth classifications do not discriminate against a suspect class. (Pet. App. 8a) (citing *Papasan v. Allain*, 478 U.S. 464, 470-71 (1977)). As a result, as the Sixth Circuit concluded, any statute targeting felons that burdens their right to re-enfranchisement, even one that burdens the indigent more so than the wealthy, will survive constitutional scrutiny if the state has a rational basis for such conditions. (Pet. App. 7a-8a).

Other courts of appeals considering similar questions have arrived at the very same result. In *Harvey v. Brewer*, the Court of Appeals for the Ninth Circuit examined an Arizona statute that led to the following system: (1) individuals convicted of a felony are automatically disenfranchised; (2) felons who complete a term of probation or receive an absolute discharge from imprisonment and pay any fines or restitution imposed are automatically re-enfranchised. 605 F.3d 1067, 1070 (9th Cir. 2010). In finding the statute constitutional, the Ninth Circuit stated: "What plaintiffs are really complaining about is the denial of the statutory benefit of re-enfranchisement that Arizona confers upon certain felons. This is not a fundamental right; it is a mere benefit that (as plaintiffs admit) Arizona can choose to withhold entirely. Therefore, we do not apply strict scrutiny[.]"

Id. at 1079. The Ninth Circuit further reasoned: "Just as States might reasonably conclude that perpetrators of serious crimes should not take part in electing government officials, so too might it rationally conclude that only those who have satisfied their debts to society through fulfilling the terms of a criminal sentence are entitled to restoration of their voting rights."[3] *Id.* at 1079.

In *Hayden v. Paterson*, the Court of Appeals for the Second Circuit examined a New York statute that bars all felons from voting upon conviction but allows voting by felons who have completed their maximum sentence of imprisonment including parole, received suspended or commuted sentences, or have been sentenced to probation or conditional or unconditional discharge. 594 F.3d 150, 160 (2d Cir. 2010). In ruling on dissimilar claims than this matter (related to disparate impact of the law and discriminatory intent in its passage), the Second Circuit stated that, "although the right to vote is generally considered fundamental, in the absence of any allegation that a challenged classification was intended to discriminate on the basis of race or other suspect criteria, statutes that deny felons the right to vote are not subject to strict judicial scrutiny." *Id.* at 170 (quoting *Baker v. Cuomo*, 58 F.3d 814, 820 (2d Cir. 1995), *vacated in part on other grounds, sub nom. Baker v. Pataki*, 85 F.3d 919 (2d Cir. 1996) (*en banc*)).

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[3] The Ninth Circuit did go on to state that it was not passing on the question of whether requiring felons "who are truly unable to pay their criminal fines due to indigency" would pass the rational basis test. *Id.* at 1080. The reason the court did not pass on that question is, just like the circumstances in this case, the plaintiffs in that case had not alleged inability to pay. *Id.*

In *Shepherd v. Trevino*, the Court of Appeals for the Fifth Circuit examined Texas statutes that led to the following system: (1) individuals convicted of a felony in any court (state or federal) are automatically disenfranchised; (2) individuals convicted of a felony in Texas state courts and placed on probation may have their conviction set aside and be re-enfranchised by the court by which they were convicted, or may be re-enfranchised by gubernatorial pardon; and (3) an individual convicted of a felony in federal court may only be re-enfranchised after presidential pardon. 575 F.2d 1110, 1112 (5th Cir. 1978). When determining what level of scrutiny to apply to this scenario, in which felons were treated differently based upon the court of their conviction, the Fifth Circuit held: "[W]e conclude that selective disenfranchisement or reenfranchisement of convicted felons must pass the standard level of scrutiny applied to state laws allegedly violating the equal protection clause. Such laws must bear a rational relationship to the achieving of a legitimate state interest." *Id.* at 1114-15.

In *Owens v. Barnes*, the Court of Appeals for the Third Circuit examined a Pennsylvania statute that disenfranchised incarcerated felons but not unincarcerated felons. 711 F.2d 25, 26 (3d Cir. 1983). The Third Circuit held that because felons did not have a fundamental right to vote, "the standard of equal protection scrutiny to be applied when the state makes classifications related to disenfranchisement of felons is the traditional rational basis standard." *Id.* at 27.

Each of the courts of appeal that have considered what level of scrutiny to apply to felon re-enfranchisement laws and disenfranchisement laws

has held that the rational basis standard should apply, as felons do not have a right to vote. As a result, the Sixth Circuit's decision here comports with the rulings of its sister circuits and the rulings of this Court that led to those decisions.

Accordingly, petitioners' reliance on *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966) (striking down a Virginia poll tax applicable to non-felons), *Lubin v. Parish*, 415 U.S. 709 (1974) (striking down a Florida statute requiring payment of a fee by minority parties for ballot access), and *Dunn v. Blumstein*, 405 U.S. 330 (1972) (striking down durational residence laws for non-felon voters), is misplaced;[4] the Sixth Circuit's decision here is not in

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[4] Petitioners confuse several issues related to the jurisprudence on voting rights. Petitioners attempt to conflate the cases striking down wealth requirements for non-felons seeking to exercise the right to vote with the matter here – felons seeking re-enfranchisement.

In the cases striking down wealth classifications for non-felons, this Court has relied upon the fact that the right to vote is a fundamental right. The Court then goes on to strike down wealth requirements as inadequate to overcome the strict scrutiny analysis. See *Harper*, 383 U.S. 663. The strict scrutiny analysis was not invoked due to the wealth classification but, rather, due to the fundamental right to vote.

Here, felons have no fundamental right to vote. As a result, each of the strict scrutiny cases petitioners cite is irrelevant in this action. This distinction is discussed in detail by the Sixth Circuit in its discussion of the misapplication of the law by the dissenting judge. (Pet. App. 9a-17a).

Petitioners' numerous arguments related to the need for an "indigency exception" are similarly misplaced. In each of the cases petitioners cite, a fundamental right was at issue (generally the right to personal liberty) and thus an indigency exception was required. *See Griffin v. Illinois*, 351 U.S. 12 (1956) (finding

conflict with any of those decisions.

B. The Sixth Circuit Correctly Stated and Applied the Rational Basis Test, As Tennessee Does Have a Legitimate Interest in Protecting the Ballot Box from Felons Who Have Yet to Complete the Court-Imposed Punishment and/or Continue to Violate Valid Court Orders.

As the Sixth Circuit stated, "to survive rational basis scrutiny, the statute need only be 'rationally related to legitimate government interests,' and 'must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification[.]'" (Pet. App. 8a) (quoting *Doe v. Mich. Dep't of State Police*, 490 F.3d 491, 501 (6th Cir. 2007); and *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993)). Furthermore, "every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." (*Id.*) (quoting *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988)). Finally, the Sixth Circuit, quoting this Court's decision in *Vance v. Bradley*, 440 U.S. 93, 97 (1979), stated: "[W]e will not

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unconstitutional Illinois' administering of a law relating to writs of error in criminal cases in such a way as to deny adequate appellate review to the poor while granting review to others); *Roberts v. LaVallee*, 389 U.S. 40 (1967) (holding that denying access to the "instruments needed to vindicate legal rights" on the basis of financial inability was unconstitutional); *Bearden v. Georgia*, 461 U.S. 660 (1983) (holding that state may not revoke indigent defendant's probation for failure to pay a fine for inability to pay).

strike down a statute on equal protection grounds 'unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational.'" (Pet. App. 8a-9a).

Petitioners do not challenge the Sixth Circuit's statement of the rational basis standard, leaving only the application of that standard. The Sixth Circuit found that Tennessee has a legitimate interest in "encouraging payment of child support and compliance with court orders, and requiring felons to complete their entire sentences, including paying victim restitution[.]" (Pet. App. 9a). In *Jones v. Helms*, this Court held that "[t]here can be no question about the legitimacy of the purpose to cause parents to support their children." 452 U.S. 412, 423 (1981). In *Harvey v. Brewer*, the Court of Appeals for the Ninth Circuit, examining the same issue as here, held that "[j]ust as States might reasonably conclude that perpetrators of serious crimes should not take part in electing government officials, so too might it rationally conclude that only those who have satisfied their debts to society through fulfilling the terms of a criminal sentence are entitled to restoration of their voting rights." 605 F.3d at 1079.

Petitioners assert that because child support obligations are not related to the underlying felony conviction, requiring those payments for re-enfranchisement cannot be rationally related to a legitimate state interest. In making this argument, petitioners ignore the legitimate state interest advanced by the Respondents – to protect the ballot box from past law-breaking felons who continue to

flout the law and violate valid court orders. Child support obligations are legal obligations reduced to court orders, just like restitution. By failing to pay child support obligations, felons are continuing the very same type of behavior that led to their disenfranchisement – breaking the laws of the State of Tennessee. In addition, child support obligations are directly related to the income of the obligor and can be changed if the obligor's income changes. *See* Tenn. Code Ann. § 36-5-101(e) and Tenn. Comp. R. & Regs. 1240-02-04-.01-.09. Furthermore, as the Sixth Circuit concluded, "statutory re-enfranchisement conditions need only further a legitimate government interest – not a legitimate government interest specifically tied to a state's authority for the initial disenfranchisement." (Pet. App. 17a) (citing *Vance v. Bradley*, 440 U.S. 93, 97 (1979)).

II. THE DECISION OF THE SIXTH CIRCUIT DOES NOT CONFLICT WITH PRIOR DECISIONS OF THIS COURT AND LOWERS COURTS IN HOLDING THAT CONDITIONING FELON RE-ENFRANCHISEMENT UPON PAYING VICTIM'S RESTITUTION AND CHILD SUPPORT OBLIGATIONS DOES NOT VIOLATE THE TWENTY-FOURTH AMENDMENT.

Petitioners' assert that the Sixth Circuit's decision here conflicts with this Court's holding in *Harman v. Forssenius*, 380 U.S. 528 (1965). In *Harman*, this Court struck down a Virginia statute that required non-felon voters in federal elections to pay a poll tax or file a certificate of residence prior to voting. 380 U.S.

at 538. In striking the statute down, this Court reasoned:

> It has long been established that a State may not impose a penalty upon those who exercise a right guaranteed by the Constitution. Constitutional rights would be of little value if they could be indirectly denied or manipulated out of existence. Significantly, the Twenty-fourth Amendment does not merely insure that the franchise shall not be "denied" by reason of failure to pay the poll tax; it expressly guarantees that the right to vote shall not be denied or abridged for that reason. Thus, like the Fifteenth Amendment, the Twenty-fourth nullifies sophisticated as well as simple-minded modes of impairing the right guaranteed.

Id. at 540-41 (internal citations and quotations omitted). As a result, this Court stated, "in order to demonstrate the invalidity [of a statute], it need only be shown that it imposes a material requirement solely upon those who refuse to surrender their constitutional right to vote in federal elections without paying a poll tax." *Id.* at 541.

Here, as the Sixth Circuit reasoned, the re-enfranchisement law at issue does not deny or abridge any rights, much less the right to vote. (Pet. App. 18a). The statutes at issue concern only the restoration of the right to vote. (*Id.*). As felons, constitutionally stripped of their right to vote, petitioners have no underlying right that they are attempting to exercise absent the payment of a tax. Thus, the Twenty-Fourth Amendment is not

implicated by the re-enfranchisement statutes; there is thus no conflict with *Harman*.

The Ninth Circuit ruled much the same way in *Harvey v. Brewer*. The court held:

> Plaintiffs' right to vote was not abridged because they failed to pay a poll tax; it was abridged because they were convicted of felonies. Having lost their right to vote, they now have no cognizable Twenty-Fourth Amendment claim until their voting rights are restored. That restoration of their voting rights requires them to pay all debts owed under their criminal sentences does not transform their criminal fines into poll taxes.

Harvey, 605 F.3d at 1080.

Furthermore, as the Sixth Circuit concluded, even if felon re-enfranchisement statutes did implicate the Twenty-Fourth Amendment, child support and victim's restitution are not taxes. Both are obligations incurred by the felons for actions unrelated to any taxing authority and unrelated to any tax statute. (Pet. App. 19a).

III. THE SIXTH CIRCUIT'S HOLDING THAT ENACTMENT OF THE TENNESSEE STATUTES DID NOT VIOLATE THE EX POST FACTO CLAUSE OF THE TENNESSEE CONSTITUTION INVOLVES AN ISSUE OF STATE LAW NOT WARRANTING THIS COURT'S REVIEW.

Petitioners assert that the Sixth Circuit exceeded its authority by ruling that the enactment of the statutes in question did not violate the Ex Post Facto Clause of the Tennessee Constitution. This issue is one purely of state law, not justifying intervention by this Court. In addition, petitioners do not challenge the legal standard the court below applied in its Ex Post Facto analysis, as it was the correct standard, again making it the sort of question not typically entertained by this Court.

Second, on the question whether the court below exceeded its authority, it certainly did not, as the federal court had supplemental jurisdiction to entertain purely state law claims that were part of a matter that presented primarily federal questions. 28 U.S.C. § 1367.

Regardless, the court below was correct in its application of the Ex Post Facto Clause of the Tennessee Constitution. As the Sixth Circuit stated, the Ex Post Facto analysis is a two step process: (1) the court must first determine whether the statute constitutes a civil or regulatory measure or is a punitive one; and (2) even if the statute was not intended to be punitive, a court should determine whether the statute is so punitive in purpose or effect as to negate that intention. (Pet. App. 21a) (citing

Smith v. Doe, 538 U.S. 84, 92 (2003); *Hudson v. United States*, 522 U.S. 93, 99 (1997); and *United States v. Ward*, 448 U.S. 242 248-49 (1980)). If the statute is intended to be punitive or is so punitive in purpose or effect as to negate the intention, then it is violative of the Ex Post Facto Clause. (*Id.*).

Here, the Sixth Circuit concluded, when it enacted the statutes in question, the Tennessee legislature did not intend it to be punitive. (Pet. App. 22a). Petitioners take issue with this finding, citing *May v. Carlton*, 245 S.W.3d 340, 349 (Tenn. 2008). In *May*, the Tennessee Supreme Court stated in dicta that statutes disenfranchising felons were punitive. *Id.* In that case, the Tennessee Supreme Court was faced with a situation in which a disenfranchisement law retroactively disenfranchised felons who had not been disenfranchised when convicted. *Id.* at 348. *May*, however, was concerned with retroactive disenfranchisement. Here, the statutes in question do not retroactively disenfranchise, they merely govern re-enfranchisement. So, even if felon disenfranchisement in Tennessee were punitive, that would be irrelevant to whether re-enfranchisement laws are. There is no evidence that the intent of the legislature in enacting the re-enfranchisement statutes was punitive or that the purpose or effect of those statutes is so punitive as to render the legislature's intent irrelevant.

In addition, the felon re-enfranchisement statutes do not add to any of petitioners' punishments for their felonies. Prior to the passage of the statutes in question, petitioners were disenfranchised; subsequent to their passage, petitioners remained disenfranchised The road to re-enfranchisement is not a part of their

punishment but, rather, a regulatory law for voter registration.

CONCLUSION

The petition for a writ of certiorari should be denied.

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(3)

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IN THE

Supreme Court of the United States

TERRENCE JOHNSON, JIM HARRIS, JOSHUA ROBERTS,

Petitioners,

—v.—

BILL HASLAM, Governor of the State of Tennessee; MARK GOINS, Coordinator of Elections; TRE HARGETT, Secretary of State of Tennessee; RICHARD HOLDEN, Administrator of Elections for Shelby County; KIM BUCKLEY, Administrator of Elections for Madison County; ALBERT U. TIECHE, Administrator of Elections for Davidson County, in their official capacities,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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Petitioners submit this reply brief to further clarify the legal bases for their constitutional claims and to underscore respondents' failure to address any of the central arguments raised in the petition.

I. TENNESSEE HAS ERECTED AN ARBITRARY AND IRRATIONAL STANDARD FOR RESTORING VOTING RIGHTS IN CONTRAVENTION OF CORE EQUAL PROTECTION PRINCIPLES AS ANNOUNCED BY THIS COURT.

While spending considerable time arguing that petitioners' equal protection claim is not entitled to a heightened level of scrutiny under the balancing test set forth in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992), respondents fail to offer any rational justification for restoring the right to vote only to those within the class of convicted felons who can financially afford to make such payments. Petitioners believe that the arguments in their petition fully and adequately address why, under any level of scrutiny, Tennessee's requirement that restitution and child support obligations be paid prior to the state restoring their voting rights violates the Equal Protection Clause.[1]

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[1] Contrary to respondents' contention, petitioners did allege in their amended complaint that denying them the right to vote based on their inability to pay restitution and outstanding child support is a form of wealth-based discrimination and has a negative and disproportionate impact on indigent people. Amend. Compl. ¶¶ 1, 36, 44, 45, and Prayer for Relief. Thus, petitioners have raised a cognizable injury for purposes of challenging the lack of an indigency exception within the law with respect to the restitution and child support provisions.

Respondents' contentions in their opposition brief, however, obscure the legal theory underlying petitioners' equal protection claim as it pertains specifically to the child support provision.

Respondents argue that the child support requirement advances the state's purported goal of "protect[ing] the ballot box from past law-breaking felons who continue to flout the law and violate valid court orders," and that "[b]y failing to pay child support obligations, felons are continuing the very same type of behavior that led to their disenfranchisement." (BIO 14-15). Yet, even under a rational basis standard, respondents still carry the burden of justifying why the child support provision does not equally apply to all those individuals within the state who owe outstanding child support, and respondents have not met their burden. *See Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985) (striking down, under rational basis, state law which bestowed tax benefits only to those veterans who moved to the state prior to a specified date).

Respondents cite *Jones v. Helms*, 452 U.S. 412 (1981), in support of the proposition that states have an interest in ensuring parents support their children. (BIO 14).[2] However, this Court upheld the

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Sprint Communications Co., L.P. v. APCC Serv., Inc., 554 U.S. 269, 273 (2008).

[2] As alleged in their amended complaint, petitioners Johnson and Harris had custody of their children when the lawsuit was filed. Amend. Compl. ¶¶ 4-5. Thus, to the extent respondents seek to encourage parents to take care of their children, petitioners Johnson and Harris already were doing that without

Georgia law at issue in *Jones*, which imposed additional punishments for those parents who had abandoned their children and then left the state, primarily because it equally applied to all parents in Georgia. 452 U.S. at 423 ("[The Equal Protection Clause] 'announces a fundamental principle: the State must govern impartially. General rules that apply evenhandedly to all persons within the jurisdiction unquestionably comply with this principle.'" (quoting *New York City Transit Auth. v. Beazer*, 440 U.S. 568, 587 (1979))).

Respondents do not contest the fact that, unlike petitioners, parents who have not been previously disenfranchised but who owe outstanding child support payments, are still able to vote. Given its unequal application, the child support provision has a dubious relationship to the State's felon disenfranchisement law, and the existence of this double standard casts considerable doubt on whether the respondents' asserted policy interests were indeed the driving force behind the provision's enactment. *See Bullock v. Carter*, 405 U.S. 134, 145 (1972) (invalidating Texas law that imposed high filing fees on political candidates regardless of their financial ability to pay such fees, ruling that "the criterion for differing treatment must bear some relevance to the object of the legislation"); *Florida Star v. B.J.F.*, 491 U.S. 524, 541 (1989) (holding that the "facial underinclusiveness" of a statute barring publication of a rape victim's name, while permitting

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the additional burden of having their voting rights tied to their parental obligations.

its dissemination through other means, "raises serious doubts about whether Florida is, in fact, serving, with this statute, the significant interests which [the state] invokes in support of affirmance).

Even accepting its asserted interest, Tennessee's goal of ensuring that parents satisfy their child support obligations cannot be met when the voting rights of some, but not all, parents engaged in the same conduct are burdened. *See City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 446 (1985) ("The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational."); *Jones*, 452 U.S. at 424 ("[T]he State's administration of its laws must be impartial and evenhanded."); *U.S. Dep't. of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) ("[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.").

Nor can Tennessee justify that distinction by relying on the fact that petitioners have felony convictions because the state has already made the decision to restore voting rights to convicted felons. *See U.S. Dep't of Agric. v. Moreno*, 413 U.S. at 534 (striking down law that denied food stamps to households comprised of unrelated people under rational basis test, holding that a law which accords different treatment based on who engages in the conduct violates traditional equal protection principles); *U.S. v. Armstrong*, 517 U.S. 456, 467

(1996) ("Our holding [in *Hunter v. Underwood*, 471 U.S. 222 (1985), striking down Alabama's felon disenfranchisement law] was consistent with ordinary equal protection principles, including the similarly situated requirement."); *Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring) (striking down Texas sodomy law that prohibited homosexuals, but not heterosexuals, from engaging in certain sexual acts, holding that, "[w]hen a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause."). In accordance with this Court's equal protection jurisprudence, the means by which Tennessee seeks to achieve its interests should equally apply to all those who fit the category of persons owing outstanding child support.

In addition to being arbitrary, Tennessee's refusal to restore the vote to convicted felons who are too indigent to meet their child support obligations is also irrational. There is no inducement under those circumstances; there is only a stick and not a carrot. Tennessee seemingly recognized as much when it provided an indigency exception for those denied restoration of their voting rights because of a failure to pay court costs. Yet, Tennessee offers no explanation, and none is apparent, why the failure to pay court costs that are directly related to one's conviction is not an impediment to regaining the right to vote if that failure is based on indigency, Tenn. Code Ann. § 40-29-202, but the failure to pay unrelated child support payments is an absolute bar regardless of indigency. This provides yet another

reason to strike down the child support provision as a violation of equal protection.

II. TENNESSEE'S CHILD SUPPORT AND RESTITUTION REQUIREMENTS PRESENT A REAL, CONCRETE BARRIER TO PETITIONERS GETTING THEIR VOTING RIGHTS RESTORED IN VIOLATION OF THE TWENTY-FOURTH AMENDMENT.

Respondents argue that the Twenty-Fourth Amendment does not apply in this case because petitioners do not have a fundamental right to vote. (BIO at 16-17). They attempt to narrow this Court's ruling in *Harman v. Forssenius*, 380 U.S. 528 (1965), by once again contending that petitioners' status as convicted felons renders the state's re-enfranchisement scheme completely immune from a constitutional challenge. *Id.* However, the broad principles announced in *Harman* cannot be so easily dismissed solely on the grounds that petitioners have felony convictions. When interpreting the Twenty-Fourth Amendment, this Court has focused on dismantling economic barriers to the ballot box regardless of how sophisticated or camouflaged those attempts might be. *See League of United Latin American Citizens v. Perry*, 548 U.S. 399, 439-440 (2006) (recognizing poll taxes as a device historically used to deny minorities the right to vote); *Johnson v. DeGrandy*, 512 U.S. 997, 1018 (1994) (describing poll taxes as a "reprehensible practice" designed to deny equal access to the ballot box).

Respondents do not contest that, but for the restitution and child support requirements, petitioners would be eligible to vote under Tennessee law. Thus, the financial obligations imposed upon petitioners solely for purposes of voting create a real and substantial economic barrier to the ballot box for them. Congress specifically sought to prohibit states from erecting a class-based system when it comes to voting, which is exactly what Tennessee's restitution and child support requirements do. This Court's decisions in *Harman* and *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966), reaffirmed that valuable principle, Tennessee's restitution and child support provisions run afoul of that goal and cannot stand.

Moreover, respondents summarily assert that the restitution and child support obligations are not "taxes" covered under the Twenty-Fourth Amendment. (BIO at 17). However, they never address any of the statutory provisions petitioners previously cited clearly showing that such payments often go directly to the state and, thus, support government programs in the exact same way that other state tax revenues are used. (Pet. 23-24). Overall, respondents have failed to distinguish the restitution and child support obligations from the category of "other taxes" the Twenty-Fourth Amendment prohibits, and they do not negate the fact that the very people the amendment seeks to protect – the poor – are disproportionately impacted by Tennessee's flawed re-enfranchisement scheme.

III. THE SIXTH CIRCUIT'S DECISION REGARDING PETITIONERS' EX POST FACTO CLAIM WARRANTS THIS COURT'S REVIEW.

Lastly, respondents contend that this Court should not review the lower court's ruling regarding petitioners' ex post facto claim because the issue involves a matter of state law and, regardless, the lower court applied the correct legal standard and reached the proper conclusion. (BIO at 18-20).[3] The Sixth Circuit's ruling cannot stand, however, because it rests on an interpretation of state law that directly conflicts with the authoritative interpretation of the Tennessee Supreme Court.

This Court has held that ex post facto clauses are "aimed at laws that retroactively alter the definition of crimes or increase the punishment for criminal acts." *California Dep't of Corrections v. Morales*, 514 U.S. 499, 504 (1995) (internal quotations and citations omitted); *Carmell v. Texas*, 529 U.S. 513, 524-25 (2000) ("the words *ex post facto laws* were technical expressions, and meant every law . . . which changed the punishment, and inflicted a greater punishment than the law annexed to the crime when committed.") (internal quotations and citations omitted). In applying that test, this Court has focused on two critical factors: (1) whether the law is retroactive, thus applying to acts committed before its passage; and (2) whether the law

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[3] Respondents also assert that the lower court had supplemental jurisdiction over petitioners' state law claim, a matter which is not at issue in this case. (BIO at 18).

disadvantages the offender affected by it. *Weaver v. Graham*, 450 U.S. 24, 29 (1981); *Lynce v. Mathis*, 519 U.S. 433, 441 (1997).

Neither the Sixth Circuit nor respondents contested the fact that Tennessee's restitution and child support obligations are being retroactively applied to petitioners. They also did not contest the fact that petitioners would have been eligible for restoration of their voting rights prior to the law's passage but are ineligible under existing law due to their outstanding financial debts. Rather, the Sixth Circuit's ruling was premised entirely on its finding that the law is not penal in nature. Pet. App. 24a. The Tennessee Supreme Court ruled otherwise in *May v. Carlton*, 245 S.W.3d 340 (Tenn. 2008), and that ruling is binding on the federal courts. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 381 (1992). Specifically, in *May*, the Tennessee Supreme Court held that Tennessee "[l]aws disenfranchising convicted felons are penal in nature," *id.* at 245 S.W.3d at 349, and thus Tennessee could not retroactively apply the disenfranchisement laws to individuals who were eligible to vote at the time of their conviction. Extending the period of disenfranchisement for those who are unable to pay restitution or child support is no less penal than an extension of petitioners' actual sentence. Whether the Sixth Circuit could have reached a different conclusion if it were writing on a clean slate is beside the point. The Sixth Circuit effectively created a clean slate by erasing what the Tennessee Supreme Court had already written about its own state law. That it cannot do.

Because petitioners satisfied all of the elements for establishing a violation of the state's ex post facto clause, the Sixth Circuit had no choice but to rule that the law's retroactive application to petitioners violated the state constitution. Petitioners ask this Court to reverse that erroneous decision and to require that the Sixth Circuit respect the Tennessee Supreme Court's interpretation of state law and enforce it accordingly.

CONCLUSION

The petition for a writ of certiorari should be granted.

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